JOURNAL

OF THE

SOCIETY OF COMPARATIVE LEGISLATION.

EDITED FOR THE SOCIETY

BY

SIR JOHN MACDONELL, C.B., LL.D.,

AND

EDWARD MANSON, Esq.

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NEW SERIES. VOL. VI. (1905).

LONDON:

JOHN MURRAY, ALBEMARLE STREET.

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PRINTED BY
HAZELL, WATSON AND VINEY, LD.
LONDON AND AYLESBURY

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F. W. Maitland

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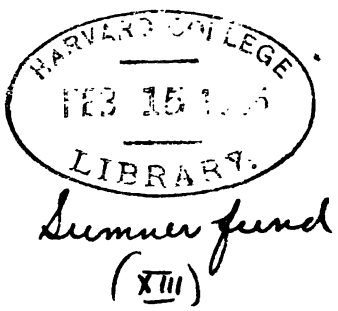

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PROFESSOR MAITLAND.

THE portrait on the opposite page is that of a writer and teacher of rare distinction, and with many claims to be remembered in this Journal. It is not only that Professor Maitland has more than any other living writer —perhaps, it might be added, than any past writer—elucidated the history of English law; that he has been a veritable discoverer in regions from which explorers less acute brought back reports that there was nothing unnoted, nothing to be changed, in the old maps; that his many books and prefaces are all conspicuous landmarks; that he unites patience in research with far higher gifts; and that he often shows the true Niebuhr touch—the aptitude for devising in presence of difficulties reconciling hypotheses, for suggesting explanations, novel but convincing by their sufficiency, of puzzling or discordant facts; some circumstance which had been left unnoticed or obscure by his predecessors being rendered by critical attrition luminous and the source of light to its environment. Professor Maitland has the modern passion for the *inédit*, and few persons have spent more days and drudged with greater zeal among manuscripts. But he is not the slave of the modern tendency to depreciate the value of all that has the misfortune to have been printed. It is not enough to say that he has written with greater charm about English law than any writer since Blackstone. His chief merit is that of the true historian —he has made the past, and parts of it the most hopelessly dead, live again; has shown what is behind institutions and forms and texts. A modern historian, akin in some respects to Professor Maitland, has said of legal terminology, legal definitions, and legal propositions: "Sous ces termes généraux, sous cette épuré de l'édifice, c'est de la société humaine, des hommes qui nous ont précédes, de ceux que nous coudoyons, de ceux qui viendront après nous, de leurs intérêts, de leurs affections, de leurs passions, de leurs besoins, de leurs travaux, de leurs droits, de vous et moi, qu'il s'agit. C'est une société, c'est une civilisation, qui s'est distillée, réduite à ses eléménts simples, et s'est analysée en ces articles de loi. . . . C'est toute la tragédie, toute la comédie humaine que met en scène sous nos yeux l'histoire de nos lois." No one has risen to the height of this, perhaps unattainable, conception. Nearer to it have come few, if any, of our writers on law.

LEGITIMATE AND ILLEGITIMATE MODES OF WARFARE.

[*Contributed by* J. B. ATLAY, ESQ.]

A Retrospect.—Writing just fifteen years ago Mr. W. E. Hall seized the occasion—his last, unhappily—to express an opinion as to the degree in which International Law could be counted on in the immediate future as a restraining force. On the one hand he saw encouragement in the multiplication of international agreements suggesting rules of action and prescribing rules of conduct. On the other he detected a widespread distrust of the reality of this progress. Many soldiers and sailors, he found, many men concerned with affairs, had little belief that much of what had been added of late years to International Law would bear any serious strain, and in his judgment Europe was moving forward towards a time at which the strength of International Law would be too hardly tried.

"Probably," he wrote, "in the next great war the questions which have accumulated during the last half-century and more will all be given their answers at once. Some hates moreover will crave for satisfaction; much envy and greed will be at work; but above all, and at the bottom of all, there will be the hard sense of necessity. Whole nations will be in the field; the commerce of the world may be on the sea to win or lose; national existence will be at stake; men will be tempted to do anything which will shorten hostilities and tend to a decisive issue. Conduct in the next war will certainly be hard: it is very doubtful if it will be scrupulous, whether on the part of belligerents or neutrals, and most likely the next war will be great."

The Armageddon foreseen by Mr. Hall has not yet, or had not til within the last few months, taken definite shape. The various wars which, without intermission, disturbed the peace of the world from 1894 to 1902, have not satisfied the conditions laid down in the last paragraph. Incidents arising out of the war between Spain and the United States, out of that between China and Japan and out of our own struggle in South Africa, have cast light on various corners of the field, but, on the whole, they have tended to give stability to the accepted code of international obligations. The disposition to anticipate future causes of difference by convention and treaty and to submit matter of actual dispute to arbitration has shown no

diminution. And the proceedings at The Hague Conference have given something like a definite legal sanction to usages which hitherto rested on military custom and the works of text-writers and jurists. But it would be idle to deny that the conflict now raging by land and sea in the Far East, the end and the possible complications of which no one can foresee, may justify Mr. Hall's predictions. It cannot fail to test more severely than any war since 1870-71 the applicability and practicability of those restraints on human savagery and passion which have been so painfully elaborated during the past centuries. And if they bear the strain, a branch of law which is too often distrusted and derided by men of action will have established a claim upon the respect and obedience of future combatants which it will be increasingly difficult to evade.

In the meanwhile the present seems an appropriate moment to enumerate, and as far as possible to classify, those modes of warfare whose legality or illegality is accepted by the Powers signing The Hague conventions and declarations, and also to consider certain other laws and customs as to which there is a recognised difference of opinion, or which from their novelty or rarity have not yet gone through the stage of international discussion.

Up to the date of the American War of Secession no effort appears to have been made by belligerents to codify the laws of war, though Gustavus Adolphus in the Swedish Discipline enjoined upon his army practices far in advance of his age. During the Thirty Years' War barbarity and inhumanity, both among the combatants and towards the civil population, reached their highest pitch, though an examination of practice in the dynastic and religious wars of the previous centuries will provide a parallel for many of the worst atrocities. But in the interval Grotius had written and the manners of the age had softened. The sack of Magdeburg and the long miserable years which followed produced a general reaction from which there have been few serious departures. The devastation of the Palatinate by the French in 1687 evoked an indignation which testified to a wide-spread change of feeling; and in 1694 the burning of Dieppe and Havre by Lord Berkeley was commented on by John Evelyn in terms of honest reprobation. During the eighteenth century there was a steady amelioration both in theory and practice. The years 1793-5, it is true, witnessed a horrible display of barbarity in La Vendée, where the republican troops conducted a war of extermination, during the later stages of which the insurgents were goaded into terrible deeds of retaliation. But the final atrocity at Quiberon reduced it to an affair of partisans, and the Revolutionary and Napoleonic wars were on the whole distinguished by an honourable humanity, though the conduct of the French in Spain, of the allies in Northern France in 1814, and of our own soldiery in the sack of the Spanish fortresses, showed lamentable outbreaks of savagery.

The Crimean and Austro-French Wars made it clear that as between

disciplined troops the nations of Europe had practically reached an accord as to the maximum of severity with which warfare could be carried on. The outbreak of hostilities between the Northern and Southern Confederacies occasioned the levying of vast armies from among a civil population to whom the realities of war were known only by name. And in April, 1863, the War Department at Washington issued from the Adjutant-General's office a "Manual of Instructions for the Government of the Armies of the United States in the Field, prepared by Francis Lieber, LL.D., and revised by a Board of Officers." In all essentials that manual represents the customs of land warfare to-day. The example was largely followed: in this country Mr. (now Lord) Thring prepared a handbook at the request of the Government, which has been revised and rewritten within the last few months by Professor T. E. Holland, K.C.

In 1874, shortly after the conclusion of the greatest European conflict since Waterloo, a Conference of the principal Powers met at Brussels to formulate, if possible, international rules for the guidance of armies in time of war. The United States were not represented, and Lord Derby only allowed an English delegate to attend on the understanding that discussion should be confined to the details of military operations and should not trench directly or indirectly upon maritime warfare. The Conference came to nothing: from the beginning it was obvious that the "Project," for which Russia was mainly responsible, was framed in the interest of Powers with large standing armies in constant readiness for mobilisation and war. The weaker nations detected an evident intention to limit the rights of volunteers, of "irregulars," and of *levées en masse*, while the severities with which the Prussians had so recently treated the Franc-Tireurs conveyed a significant warning.

At the same time the final draft of the Russian "Project," as modified during the course of the Conference, was sufficiently in harmony with custom and accepted usage to allow of its being taken by the Institut de Droit International as the basis of its manual drawn up at the Brussels session in 1880. Finally The Hague Conference of 1899 has in the main adopted and amplified them in its "Regulations respecting the Laws and Customs of War on Land," which are intended to serve as general rules of conduct for belligerents in their relations with each other and with populations. These regulations do not profess to embrace all the circumstances which occur in practice, and the Conference expressly declared that in cases not covered by the regulations, "populations and belligerents remain under the protection and government of the principles of International Law as they result from the usages established between civilised nations, from the laws of humanity, and from the requirements of the public conscience."

Side by side with the elaboration of the laws which regulate actual warfare, other movements for the amelioration of its horrors were in progress.

The International Conference held at Geneva in 1864 provided for the protection of the wounded, the hospitals, and the medical services generally, and its provisions are now incorporated in the above-cited Hague Convention. Another Convention of the same date and place as the latter applied the rules of the Geneva Convention as far as possible to the conditions of naval warfare. In 1868 a Declaration of Great Powers assembled at St. Petersburg, of which the United States was not one, forbade the use of explosive bullets; and in 1899 at The Hague similar declarations attempted to extend the principle, and to put further restraints on the application of scientific discovery to warfare. The non-accession of Great Britain and of the United States has robbed these latter, however, of much of their value.

It ought not then to be difficult to draw up a fairly comprehensive list of acts which are expressly prohibited in war, acts which are authorised and regulated, and acts which lie outside the various conventions. Such a classification does not pretend to be exhaustive, and it applies with small exceptions to land warfare. From the absence of any similar attempts at codification in the past maritime warfare is involved in greater obscurity, but the problems presented by it are on the whole of less complexity.

I. **Acts Prohibited.**—(i) By Art. 23 of The Hague Convention it is prohibited—

(*a*) *To employ poison or poisoned arms.*

(*b*) *To kill or wound treacherously individuals belonging to the hostile nation or army.*

Professor Holland in his manual (p. 29) suggests that this includes by implication any offer for an individual "alive or dead." Such an offer in a war between the signatories of the Convention may be put out of the question; nor is it likely in the case of a rebellion, even when the insurgents have not acquired belligerent rights, that we should meet with any repetition of the proclamation which put £40,000 on the head of Prince Charles Edward. In warfare against uncivilised tribes, the nations, I think, will still be left to their consciences without reference to this article.

(*c*) *To wound or kill an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion.*

The general tenor of this article is clear; the prevention of the barbarous and obsolete custom of putting to the sword a garrison which defended a post judged by the assailant to be untenable. But its application becomes difficult when men cling to a position to the last gasp, discharge their magazines in the face of the charging foe, and then fling down their rifles and cry for quarter. Whether they receive it will depend upon the self restraint and control over their men possessed by the officers of the attacking force.

(*d*) *To declare that no quarter will be given.*

(*e*) *To employ arms, projectiles, or materials of a nature to cause superfluous injury.*

"Superfluous injury" is a term which may well defy closer definition, nor is it easily possible to conceive more hideous wounds than are inflicted by unexceptionable implements of warfare or a fate more horrible than that of the engine-room complement when a battleship goes down. The preamble of the St. Petersburg Declaration sets out that for the purpose of weakening the military forces of the enemy it is sufficient to disable the greatest possible number of men. But the slate-pencil projectile of the modern small-bore rifle in many cases inflicts a wound which, treated in a well-equipped field hospital, may admit of the return of the sufferer to the fighting line in an incredibly short time, without appreciably weakening the force of which he is a unit.

By the Declaration of St. Petersburg the contracting parties *have renounced, in case of war among themselves, the employment by their military or naval forces of any projectile of a weight below* 400 *grammes* (14 oz.) *which is either explosive or charged with fulminating or inflammable substances.*

An effort was made at The Hague to extend the principle, and the Powers represented there, with the exception of the United States and Great Britain, *renounced the use of projectiles the sole object of which is the diffusion of asphyxiating or harmful gases,* and of *bullets which expand or flatten easily in the human body, such as bullets with a hard casing which does not entirely cover the core, or is pierced with incisions.*

This last article was expressly aimed at the use of the so-called Dum-Dum bullet. But Great Britain, whose army finds its main vocation in fighting savage tribes to whom nothing short of a "cripple stopper" is a deterrent, can never afford to fetter its action and sacrifice the lives of its soldiers by adherence to any such proposition. During the Boer War the Dum-Dum bullet was forbidden, but the fact remains that a very little ingenuity on the part of the soldier will convert the ordinary rifle bullet into an expanding or flattening missile.

Another of The Hague declarations, from which Great Britain alone dissented, prohibited, for a term of five years (which is now expired) the throwing of projectiles and explosives from balloons, or by other new methods of a similar nature.

(*f*) *To make improper use of a flag of truce, of the national flag, or the military distinguishing marks and the uniform of the enemy, as well of the distinctive signs of the Geneva Convention.*

What is an "improper use" of the distinctive signs of the Geneva Convention will always afford room for recrimination in warfare. But under modern conditions we must expect a growing disinclination to allow them to confer immunities which interfere with the ever-increasing range of fire.

(*g*) *To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war.*

Who is to decide upon the necessities of war? Of the military necessity for the destruction of property a subaltern of engineers must often be the judge. Destruction in the broader sense of devastation will be considered in another connection.

(ii) By Arts. 25-8 of The Hague Convention—

(*a*) *The attack or bombardment of towns, villages, habitations, or buildings which are not defended is prohibited.*

(*b*) *The commander of an attacking force, before commencing a bombardment, except in the case of an assault, should do all he can to warn the authorities.*

(*c*) *In sieges and bombardments all necessary steps should be taken to spare as far as possible edifices devoted to religion, art, science, and charity, hospitals and places where the sick and wounded are collected, provided they are not used at the same time for military purposes. The besieged should indicate these buildings or places by some particular and visible signs, which should previously be notified to the assailants.*

(*d*) *The pillage of a town or place, even when taken by assault, is prohibited.*

With regard to (*c*) it is to be feared that the saving clause "as far as possible" will rob the article of most of its practical value. The experiences of Paris and Strasburg leave us small hope that, when once a bombardment has been resolved on, one edifice will fare better than another; in the case of a small town or one built on a confined space the distinction will be practically impossible.

(iii) Arts. 44-7 of The Hague Convention prohibit—

(*a*) *Any compulsion of the population of occupied territory to take part in military operations against its own country.*

(*b*) *Any pressure on the population of occupied territory to take oaths of allegiance to the hostile Power.*

(*c*) *Confiscation of private property.*

(*d*) *Pillage.*

It is not to be anticipated that (*a*) will act as a check upon that exaction of forced labour upon the railways, etc., and in workshops which is one of the most galling incidents of hostile occupation, or that (*c*) will be held to have any bearing upon the exaction of contributions and requisitions, which are treated of below.

(iv) By Art. 50 of The Hague Convention—

No general penalty, pecuniary or otherwise, can be inflicted on the population on account of the acts of individuals for which it cannot be regarded as collectively responsible.

The crux of this article is in the words "for which it cannot be regarded as collectively responsible," and they involve the whole question of reprisals. The English manual (Holland, p. 46) directs that reprisals must be exercised subject to the following restrictions: (1) the offence in question must have

to its own use without any obligation to make good the loss or repay the money.

III. **Acts Sanctioned by Custom.**—We now come to a class of acts which, though they come under no convention, custom has so hardened as to bring within the rules of war.

(i) *Formal declaration of war* is not necessary to legalise hostilities. Practice has varied very much during the last century, and it is impossible to lay down any hard and fast rule. Such sharp practice as the invasion of Silesia, in a time of absolute peace, by Frederick the Great in 1741 will always be reprobated, but under modern conditions, when mobilisation extending over a period of weeks is an almost invariable prelude to war, there is an accompanying state of tension when the guns may go off of themselves. The rupture of negotiations, even the withdrawal of diplomatic representatives, is not absolutely conclusive as to the hopelessness of preserving peace, but it is generally accepted that when such a step has been taken either side is at liberty to take its coat off and begin. The precise sequence of events in the opening movements of the present war is still involved in obscurity, but so far as is known in this country there is no evidence that the Japanese did anything they were not justified in doing.

(ii) *Devastation* is permissible when required by military necessity, and according to the English military manual (p. 4) an invading army is justified on these grounds in devastating whole tracts of country, burning dwellings, and clearing the district of supplies. *A fortiori*, the invaded may anticipate the enemy and do as the Portuguese did before the lines of Torres Vedras. Devastation, however, on the part of the invaders will only be resorted in the last extremity, and at the command of the supreme military authority. It is an odious and not always an effective necessity, and the duty which modern practice imposes upon the invader of making the best provision he can for the dispossessed population may involve him in responsibilities which neutralise the advantage he has derived from the process of devastation.

(iii) *Destruction of property by way of reprisal* stands on a different footing from devastation. It is undoubtedly lawful, and the distinction that it must be exercised not by way of vengeance, but solely in order to prevent a repetition of the offence, will hardly stand the test of practice. In May, 1900, on entering the Transvaal Sir Redvers Buller issued a proclamation under which the residents of any locality were held responsible "both in their persons and their property" if any damage was done to railways or telegraphs, or any violence done to any members of the British forces in the vicinity of their homes. On June 16th in the same year, Lord Roberts proclaimed "that the destruction of railway bridges and culverts could not be done without the knowledge and connivance of the neighbouring inhabitants and the principal civil residents in the districts concerned"; and he warned them that they would be held responsible for aiding and

abetting; "the houses in the vicinity of the place where the damage is done will be burnt and the principal civil residents will be made prisoners of war." The Germans carried those principles to an extreme length, and on the destruction of the bridge of Fontenoy to the east of Toul, not only was the whole village destroyed by fire, but a fine of ten million francs was imposed on the district included in the Governor-Generalship of Lorraine. The assumption that destruction of bridges, etc., must be done with the privity of the neighbourhood is not always justified by facts, and Art. 50 of The Hague Convention prescribes that *no general penalty, pecuniary or otherwise, can be inflicted on the population on account of the acts of individuals for which it cannot be regarded as collectively responsible.* The English proclamations in South Africa underwent constant revision. The following, dated November 18th, 1900, represents, I believe, the final instructions:—

"No farm is to be burnt except for an act of treachery, or when troops have been fired on from premises, or as punishment for breaking of telegraph or railway lines, or when they have been used as bases of operations for raids, and then only with direct consent of the General Officer commanding, which is to be given in writing. The mere fact of a burgher being absent on commando is on no account to be used as reason for burning the house."

(iv) The English manual (p. 6) authorises a general commanding an army in the field to "take stringent measures" to repress all attempts at interference with his communications by road, railway, or telegraph. Such destruction of property as was ordered by Lord Roberts is the usual penalty. On June 19th, 1900, the same General, in view of the prevalence of train-wrecking, gave orders that principal residents of the district should personally accompany the trains. The order was, however, rescinded on July 27th. The practice, when adopted by the Germans in France, had been condemned by the majority of writers on International Law.

(v) Neutral subjects resident in or passing through the territory of a belligerent must not be forced by either belligerent to take part in hostilities, but they are liable, just as the other inhabitants of the country, to suffer through the events of the war. They may be removed from their homes or banished from the country on suspicion of misconduct or for reasons of strategic convenience (English manual, pp. 8, 9).

IV. **Naval Warfare.**—In the remaining space at my disposal it is impossible to attempt any adequate treatment of the rules of war by sea. With a few exceptions they exist only as a body of customs. But the St. Petersburg Declaration extends, as we have seen, to naval as well as to land forces, one of The Hague conventions has adapted to maritime warfare the principles of the Geneva Convention, and the Declaration of Paris abolished privateering, exempted neutral goods not contraband of war from capture, and established the doctrine of effective blockade. So far Great Britain has refused to be a

party to any international discussion which might fetter her action on her own element, nor is it likely that the example of the manual of the laws and customs of war on land will be followed in the sister-service.

The introduction of new implements of destruction, and of new means of communication, are rendering imperative some sort of understanding among the chief naval Powers of the world. The rules which are supposed to regulate the right of visit and search and the rights and duties of neutrals not only vary in the practice of different nations, but they are based on law which was evolved before the days of steamships and electric telegraphs. At this moment there is no international agreement in existence as to the rights which belligerents may exercise over submarine cables which connect neutral with neutral territory, or neutral with belligerent, and without some such agreement it will be a most difficult task to define their legal position on the basis of existing law. The installation on neutral territory or on board neutral vessels of receiving stations for the transmission of "wireless" messages is a contingency which has arisen since The Hague Conference.

How far, again, is the use of mines permissible outside the limit of territorial waters? We have had no official report, but it seems unquestionable that when on May 15th last the *Hatsuse* sank in thirty fathoms of water from contact with the Russian mines, these had been laid clearly outside the three-mile limit. Whether the mines which were alleged to be floating at large in the Gulf of Pechili actually did so, and whether if afloat they were turned wilfully adrift, we have no reliable evidence. But it is clear that while belligerents cannot claim, without maintaining an effective blockade, to render whole tracts of ocean inaccessible, yet the three-mile limit will never be permitted to check the enterprise of hostile navies bent on mine and countermine. As a matter of fact, that limit is not universally accepted, though a State is presumed to acquiesce in it in the absence of express notice to the contrary. A general extension of the breadth of territorial waters to a distance corresponding to the range of modern cannon is theoretically desirable, but the practical difficulties may be illustrated by the case of the Engish Channel if war were to break out between England and France.

An important point on which the sailors and the jurists are at variance relates to the conditions under which contributions and requisitions may be levied by a naval force. In 1882 a well-known French admiral, who subsequently held the post of Minister of Marine, declared that the coast towns of the enemy "irrespectively of whether they are fortified or not, or whether they are commercial or military," are the legitimate prey of a hostile fleet, and that the policy of the French navy would be to burn them and lay them in ruins, or at the very least to hold them mercilessly to ransom. This policy found numerous supporters in the French press, not confined by any means to naval officers, but the French Government, on being asked by Lord Granville whether it accepted responsibility for the writings of

the admiral, dissociated itself from them. It is well known that English officers high in rank believe not only that our coast towns would be bombarded in time of war, but that the practice would be legitimate and be repaid with reprisals on our part. And in 1888 during the naval manœuvres the admiral of the "invading" squadron went through the form of making demands for ransom at Liverpool and elsewhere under penalty of an imaginary bombardment. The British Government has given no indication of its views on the matter, and it is hard to say whether our admirals will have anything in the shape of a free hand. Mr. Hall (5th ed. 435) was of opinion that requisitions of coal, food, clothing, or necessary stores might be enforced by bombardment or other means of intimidation. But he regarded the exaction of ransom as unjustifiable. "It is not to be denied," he wrote, "that contributions may be rightly levied by a maritime force; but in order to be rightly levied, they must be levied under conditions identical with those under which they are levied by a military force. An undefended town may fairly be summoned by a vessel or a squadron to pay a contribution: if it refuses, a force must be landed; if it still refuses, like measures may be taken with those which are taken by armies in the field. A levy of money made in any other manner than this is not properly a contribution. It is a ransom from destruction." To admit the existence of a right of unrestricted devastation, which is what the doctrine of ransom comes to, is to plunge us back into the military code of the seventeenth century.

LEGITIMATION BY SUBSEQUENT MARRIAGE.

[*Contributed by* SIR DENNIS FITZPATRICK, K.C.S.I.]

Introductory Remarks.—1. The authorities of Jamaica have had under consideration for some time past certain proposals for amending the law of the island in the hope of improving the morals of the people, and have asked the Society of Comparative Legislation to furnish them with information regarding the laws in force elsewhere on the points with which it is proposed to deal. One of the proposals put forward is for the introduction of the rule of legitimation by subsequent marriage, and some weeks ago I undertook to supply the Society with materials for a reply to Jamaica, so far as this particular proposal was concerned. I quite saw that the task would be a somewhat laborious one, but as it seemed to be only one of going to two or three libraries and plodding through a certain number of books, I thought I should have no difficulty in accomplishing it by devoting my leisure time to it for a few weeks. Before I was long at work, however, I found that it would be by no means easy to supply anything of the kind required really complete and up-to-date without unduly delaying the Society's reply to Jamaica. The fact is that information of the kind required is in the case of many countries not so readily accessible here as I imagined it would be: no doubt, if time would allow of my running about to all the libraries, I should be able to get further information; but a really complete note on the subject could not be prepared without entering into correspondence with people abroad, and there is of course no time for that. I may be able to get something more before the Society are in a position to reply on the other points referred to in the Jamaica letter; but meantime I think it better to submit such information as I have been able to get together, and perhaps it will suffice, for, after all, it may be enough for the purposes of the Jamaica authorities to have a general view of the position illustrated by reference to the law of a fair number of countries. The lacunæ in my note will be obvious at a glance, and where I am not sure of my information being up-to-date, I have taken care to indicate this by mentioning the date of the most recent work I have been able to refer to or otherwise.

2. Next, I think it well to explain at starting that I have limited my task in a certain way. If the Jamaica authorities resolve to enact a law

establishing legitimation by subsequent marriage, a number of subordinate questions will have to be considered by those who are to frame that law.

I may mention the following:

(1) Should the marriage of a man and a woman be sufficient in itself to legitimate all children born to them before such marriage, or should it be necessary for the legitimation of a child that it should be expressly acknowledged by one or by both parents; and, if so, at what time should the law require the child to be recognised for this purpose? In particular, should the recognition be effectual if made at any time, no matter how long, after the marriage?

(2) Should any classes of children be excluded from the benefit of the new rule? In particular, should children begotten in adulterous intercourse be excluded?

(3) Should a child, if of full age, be allowed to object to being legitimated, and should objections by any other persons interested be entertained?

(4) Should the issue of a child, dead before the marriage of his parents takes place, be put in the same position as if such child had lived to be legitimated?

(5) Should the law legitimate a child notwithstanding that, between the time of his birth and the time when his parents married one another, one of them had been married to some one else?

(6) Questions as to the point of time from which the legitimation should operate, especially when its taking effect may depend on a recognition of a child after the marriage; as to the protection of rights of third parties already acquired, and so on.

(7) Questions as to limitations to be set to the application of the proposed law, both in the case of people (like Indian immigrants) who live under a personal law of their own and in cases where conflicts with the laws of other countries may be likely to present themselves.

Now all these questions, with the exception of the first (as to which I shall have something to say in a moment), are questions of detail, which it will be time enough to consider if and when the Jamaica authorities determine to introduce a measure establishing legitimation by subsequent marriage. I may add that, though all of them would have to be borne in mind by those framing such a measure, it does not necessarily follow that they would be expressly dealt with by the law; indeed, some legislatures in dealing with this subject have, wisely or unwisely, left most, or in some cases all, of them to be settled by the Courts. This being the position, I have thought it best not to lengthen this note by taking up these questions in detail, though I may occasionally refer to some of them when there seems to be any special reason for doing so.

3. The first question—that as to whether, in order to effect the legitimation, an express acknowledgment of the children by the parents

should be required in addition to the marriage—stands, as I have just intimated, on a different footing, and as it touches the main framework of the law, it should be considered at the very start. The requirement of an express recognition, though it is now to be found in a large number of existing systems of law, seems to be quite a modern innovation. There is indeed something like a precedent to be found for it in the ancient practice of raising the ante-nuptial offspring to the status of legitimate children—"Mantle children," as they were called—by placing them under the cloth which was spread over the parents during the marriage ceremony. But this, as observed by Pollock and Maitland (vol. ii., p. 395), was "rather an act of adoption than a true legitimation *per subsequens matrimonium*"; and the legitimation by subsequent marriage in the existing systems of law to which I refer is in no way historically connected with it. The immediate or remote origin of it in them all is to be found in the Canon Law, and, according to that law, the marriage effects the legitimation *ipso jure* without any further act on the part of the parents, and even against their will. It was the authors of the French Civil Code who, as far as I can make out, first introduced the requirement of the express recognition of the child by the parents; and in order to put the reader in a position to see the probable object and effect of certain provisions, which he will find constantly recurring in the various laws I shall have to place before him, and the bearing of those provisions upon one another, it seems desirable to explain here how this came about.

4. Under the old French law the mere fact of the marriage of a man and a woman was sufficient to legitimate a child born to them before such marriage; but it need hardly be said that if the parentage of the child was disputed, and especially if the question was one as to the paternity, a difficult issue was apt to be raised, just as might happen in other cases in no way connected with legitimation, as, *e.g.*, in a case where an unmarried woman who had given birth to a child sought to establish some claim against a particular man by alleging that he was the father of that child. When such an issue was raised it was dealt with very much as any other issue of fact would be. In a case like that just put, for example, the woman might bring evidence to show that the man was in the habit of having intercourse with her at the time she must have become *enceinte*; in answer to this he might set up the plea that other men as well had been having intercourse with her at that time, and so on.

All this was found to give rise to scandals and abuses,[1] and the matter seems to have been to some extent aggravated by the action of the Courts, which are said to have adopted the maxim "creditur virgini parturienti." The evils thence arising had come to be so strongly felt by the time of the Revolution, that in the celebrated Law of the 12th Brumaire, Year II., which put illegitimate children generally on

[1] Dalloz Rep., *Patern. et Fil.*, ss. 413-14, Locré, t. vi. p. 267, 318.

the same footing as legitimate children for the purposes of inheritance, a clause was inserted strictly limiting the nature of the evidence admissible to prove the filiation of the former; and when the Civil Code came to be framed, its authors laid down for the illegitimate child the broad rule "La recherche de la paternité est interdite" (see Art. 340 of the code). There was an exception made in cases of *enlèvement*, but with that we need not trouble ourselves. Further, the *recherche de la maternité* was limited in certain ways; but with that, too, we need not trouble ourselves.

It might seem to us that the evils above referred to were less likely to arise in cases of the class with which we are concerned here, and in which, *ex hypothesi*, the parents or alleged parents would have married one another; but the new rule was applied to such cases as well as to others.

If the matter had stopped there the position would apparently have been this, that the marriage of the parents would still have legitimated the child *ipso jure*, but that unless the father had voluntarily acknowledged the child as his either before or after the marriage, it would have been impossible to establish the child's position.

The matter, however, did not stop there. The authors of the code raised another point.[1] They thought that the position should be clearly fixed once and for all at the time of the marriage. They feared that, if an acknowledgment of parentage made at any time after the marriage were to be treated as sufficient, this might open a way to the introduction of supposititious children into the family or to the evasion of the rules relating to adoption, and they accordingly framed their main rule regarding legitimation by subsequent marriage in such a way as to make an acknowledgment of the child by both parents before the marriage, or in the course of the marriage ceremonies and proceedings, an essential condition of the legitimation. That rule ran thus: "Les enfants nés hors mariage . . . pourront être legitimés par le mariage subséquent de leurs père et mère, lorsque ceux-ci les auront légalement reconnus avant leur mariage, ou qu'ils les reconnaîtront dans l'acte même de célébration." In laying down their rule in this way the authors of the code do not seem to have *aimed* at giving the parents of an illegitimate child the option of marrying one another without legitimating it; indeed, it was said that that was a thing which it could hardly be supposed any parents would think of doing;[2] but it seems clear that, at least in cases where the father has not already formally acknowledged the child, the code gives such an option[3]—in fact, makes the legitimation something like an adoption; and this in some places, and among some classes of people, might make a practical difference of considerable importance.[4]

[1] Demolombe, *La Paternité* (1860), s. 361, Locré, t. vi. pp. 17, 261.

[2] Locré, t. vi. p. 314.

[3] Demolombe, *La Paternité* (1860), s. 365.

[4] Since the above was written, I have come across certain references to the subject,

There is one point more to be referred to in this connection—namely, that it is held[1] in France that when a declaration of parentage has been made by a Court before the marriage, that must be treated as a "*reconnaissance forcée*" on the part of the person against whom such declaration is made, and is accordingly as effectual for the purpose of legitimation as an actual *reconnaissance* by that person. This would not apparently be of much importance under the French law, as such a declaration cannot under that law be made against a father save in the exceptional case of *enlèvement*, and, moreover, it is restricted to declarations made before the marriage; but we shall come across other laws presently, under which it might make a considerable difference.

5. It will be found that some of the laws which we shall have to consider, and which, drawing their inspiration directly or indirectly from the French Code, have introduced the element of acknowledgment of the child by the parents in some shape or other into the process of legitimation, have in working the matter out diverged considerably from the French Code. There are, *e.g.*, laws which introduce this element, but leave inquiries into parentage more open than the French Code, or do not restrict them at all. Again, there are laws which make an acknowledgment after the marriage as effectual as one before it. Lastly as regards the so-called "*reconnaissance forcée*," we shall find some laws which seem clearly to exclude the idea of anything of the sort; others which expressly put a declaration of parentage by a Court on the same footing as an acknowledgment by the parent; others, again, in the case of which one could not venture to predict what view is likely to be taken on this point.

I have referred to all these matters in what may seem at first sight unnecessary detail, because it is essential that any one drafting a law establishing legitimation by subsequent marriage should keep them all in mind and consider their bearing one upon another. It will, *e.g.*, be seen that in so far as you permit a Court to inquire into questions of parentage, and put a declaration of parentage by it on the same footing as an actual acknowledgment by the parents, the actual acknowledgment ceases to be an essential condition of the legitimation; and if you, as the Malta Law (*post para.* 35) seems to do, leave the door completely open to inquiries into parentage, and at the same time put a declaration of parentage pronounced by a Court, whether before or after the marriage, on the same footing as an express acknowledgment by the parent, you will have worked

from which it would appear that parents of illegitimate children in France are by no means so anxious to legitimate them as the authors of the code seem to have expected; and that there is a demand in some quarters for an amendment of the rule as to the *recherche de la paternité*. See, as regards this last point, a review by M. Léon Lallemand of a work by M. Augée-Dorlhac at p. 355 of the twenty-second volume of the *Bulletin de la Société de Législation comparée*.

[1] Demolombe, *La Paternité* (1860), ss. 362-3. Dalloz Rep., *Patern. et Fil.*, ss. 468-70. Suppl. (1893), s. 191.

round a considerable way towards a position, for most practical purposes, similar to that which existed under the old French Law.

I gather from some papers I have seen that the Jamaica authorities propose to leave inquiries into parentage completely free, and possibly to promote them; but as this matter belongs to another branch of the reform which is being dealt with separately, I shall not reproduce in detail the provisions of the various laws relating to it, but shall merely refer briefly to them when necessary.

6. There are one or two further preliminary remarks which I think it well to make before proceeding to give my statement of the laws.

To begin with, the proposal to introduce the rule of legitimation by subsequent marriage into a country where it has not before prevailed has to be considered in more than one aspect. If we were to look only at its direct effect in relieving illegitimate children from the unmerited hardships inflicted on them, from the legal disabilities under which they labour, and the social stigma which attaches to them, there could hardly be room for doubt as to the desirability of adopting it. There have been few, if any, civilised legal systems, except the English system and those derived from it, which have not provided some mode or other of affording such relief; and of all other modes, legitimation by subsequent marriage is that which has held the field. It is only natural that if the father of an illegitimate child raises its mother to the position of a wife, he should thereby raise the child to a status of legitimacy; and, as has often been said, there is the more reason for this inasmuch as, if the child is not legitimated by the marriage, the birth of other children after the marriage is apt painfully to accentuate his position by the contrast to which it gives rise.

But we cannot afford to look at the proposal only from this point of view. We must look at it also with reference to its probable effect on the morality of the community at large; and when we come to look at it from this latter point of view, there is certainly room for difference of opinion. No doubt where, as appears to have been the case in Imperial Rome, and as is pretty clearly the case in some countries at the present day, the parents of illegitimate children are, either from affection for those children or for any other reason, anxious to legitimate them, the establishment of legitimation by subsequent marriage furnishes an additional inducement to them to marry; and in so far as this inducement operates, you have so many illicit unions converted into marriages. But, on the other hand, there is the danger that if you hold out to a man and a woman, who are tempted to form an illicit connection, a means by which they can at any time (so to speak) regularise the position all round, instead of being perhaps left, as in England, saddled with a bastard child for life, this may lead to such connections being formed with a lighter heart and to the process of regularisation being indefinitely postponed.

7. Such are the main arguments commonly put forward in modern legal

treatises in favour of and against the rule of legitimation by subsequent marriage. They have usually been put forward by the authors of such treatises simply from a loyal desire to justify the legal systems, under which those authors have been brought up, in accepting or rejecting the rule, as the case may be. But they need to be carefully considered when a proposal for legitimation like that now before us is put forward; and as their force, whether bearing in favour of or against the rule, depends to a very large extent on the particular circumstances of the society concerned, they must be considered by those familiar with the conditions of that society and with special reference to those conditions. They seem to have been considered in that way when the matter was dealt with by the Roman lawgivers, and they have also been dwelt on in some of the discussions which have taken place in connection with the legitimation Acts passed in our own time in certain English-speaking countries—a matter to which I shall have presently to refer; but elsewhere the course taken has been the result, not of deliberate consideration, but of historical circumstances and hence it is desirable to deal with the subject to a certain extent from the historical point of view.

8. It seems most convenient to speak of the various laws which I shall have to notice in the following order:

(1) The Roman Law, para. 9.
(2) The Canon Law, paras. 10-12.
(3) The laws of countries on the Continent of Europe, paras. 13-22.
(4) The laws of certain republics on the continent of America, excluding the United States, para. 23.
(5) The laws of the British Islands, paras. 24-8.
(6) The laws of His Majesty's possessions abroad, paras. 29-43.
(7) The laws of the United States, paras. 44-6.

9. (1) **The Roman Law.**—The root of the legitimation by subsequent marriage is to be found in the Roman Law—that is to say, in the legislation of the Christian Emperors beginning with Constantine; but the legitimation (to use the modern word) was with them something widely different from what it became in later times. It was confined in its operation to "natural children," *i.e.* to the offspring of parents living in *concubinatus*, which was with the Romans a union recognised and regulated by the law, practically an inferior sort of marriage, wanting the most important legal effects of the true marriage.

The earliest law regarding this mode of legitimation that has come down to us is that of Zeno (A.D. 476),[1] and it was confined in its operation to natural children born before it came into force, all persons being expressly warned that if they thereafter entered into or continued in a state of concubinage, instead of contracting a regular marriage, they were not to expect that they would be allowed to legitimate by a subsequent regular

[1] L. 5 Cod. (v. 27).

marriage any natural children that might in future be born to them. It is to be gathered from the texts, which have come down to us, that among the Romans the parents of natural children were commonly desirous of raising them to the higher status, and it is understood that this method of effecting that object was devised, partly at least, with a view to providing an additional inducement to parties living in the state of concubinage, which was even then condemned by the Christian teachers, to exchange that state for the state of matrimony; and it may be conjectured that Zeno confined his law to natural children already in existence from an apprehension of the sort referred to above (para. 6), that if it were left open to parties in future to indulge in concubinage, and then, whenever they pleased, to regularise the whole position retrospectively by a marriage, that might tend, on the whole, to encourage concubinage rather than to diminish it.

However that may be, we find that Justinian removed this limitation and left it open to any parties living in concubinage to raise their natural children to the higher status by marrying one another; but the rule continued to be applicable only to children born of concubinage to the exclusion of children born of those looser connections which were strongly condemned by the law. The only further point which it seems material for our purpose to note was that the marriage effected the legitimation *ipso jure*, no sort of formal recognition of the children by the parents being required.

Some sort of ratification by the child was required by a law of Justinian, but that was apparently because the marriage brought the child under power, and so we need not trouble ourselves about it in this connection.

10. (2) **The Canon Law.**—Though the Imperial legislation to which I have just referred is ascribed to the influence of the Christian teachers, there is, it appears, nothing bearing on the subject of legitimation by subsequent marriage to be found in the laws of the Church before the latter half of the twelfth century, and *this* though the Church had, some considerable time before, got the law of marriage pretty well into its own hands, and though the Canon Law had begun to be unified and systematised. The point, it is said, is not once referred to even in Gratian's *Decretum*; but soon after that we find some important rulings regarding it in certain decretal letters of Pope Alexander III. (the celebrated Canonist Roland); and with reference to what occurred later on in England, it is interesting to note that the earliest of these letters,[1] which is ascribed to the year 1172, and is spoken of as a *capitulum famosum* and one daily quoted *in utroque foro*, was addressed to the Bishop of Exeter. It was obviously impossible for the Church, which condemned the *concubinatus* as something even worse than casual illicit intercourse, to adopt the Roman law of legitimation by subsequent marriage as it stood; for that law, as we have already seen, proceeded on the view that the *concubinatus* was a thing to be recognised and regulated by the law, and treated, in this as in other

[1] c. 6. X. (iv. 17)

of the celebration. When the recognition takes place subsequently to the marriage, the legitimation has effect only from the date of the recognition. This code, too, forbids the *recherche de la paternité*.

17. *Portugal.*—The Portuguese Civil Code was promulgated on July 1st, 1867 (translation by Laneyrie and Dubois, Paris, 1896). Its provisions (Arts. 119-21, taken with Arts. 130-33) resemble the provisions of the French Code, but with certain differences. In the first place this code, like the Italian Code, allows the recognition to take place at any time after the marriage as well as before; but, unlike the last-named code, gives effect to the legitimation in all cases from the date of the marriage—a provision the possible result of which, in cases where a long interval elapses between the marriage and the recognition, would need careful consideration.

Again, this code expressly places the proof of the filiation of a child before a Court on the same footing for this purpose as a recognition by the parent (see *supra*, para. 4); and it is to be noted that the Portuguese Courts have a freer hand in respect to this matter than the French Courts, the *recherche de la paternité* being allowed (Art. 130), "si l'enfant a la possession d'état conformement à l'article 115," which *possession d'état* consists "dans le fait d'avoir été reconnus et traité comme enfant tant par le père et mère que par leurs familles et par la société."

18. *Spain.*—The Spanish Civil Code was promulgated on July 24th, 1889 (translation by Levé, Paris, 1890). It differs in form from the Portuguese Code; but if I rightly understand it, its main provisions are similar in their substantial effect.

19. *Austria.*—The Austrian Civil Code was promulgated on June 1st, 1811 (edition with amending laws and notes, Vienna, 1875). Art 161 runs as follows:

"Kinder, welche ausser der Ehe geboren und durch die nachher erfolgte Verehelichung ihrer Eltern *in die Familie eingetreten sind*, werden sowie ihre Nachkommenschaft, unter die ehelich Erzeugten gerechnet," etc.

I give it in the original because I do not understand the words I have italicised, and it possibly may be that there is something in them to prevent the mere fact of the marriage effecting the legitimation.[1] If however, there is not, it seems clear that the mere fact of the marriage legitimates the children, no sort of express recognition being needed; and from Art. 163 it is to be gathered that there is no artificial limit placed to inquiries into paternity.

20. *The German Empire.*—The Civil Code for the whole German Empire, which is the most important of all the recent codifications, came into force on January 1st, 1900. Arts. 1719-22 treat of legitimation by

[1] Since this was written I have learned from Mr. Schuster that the words in question are not construed as preventing this; but it is held that if a child is dead at the time of the marriage he is not deemed to have been legitimated by the marriage.

subsequent marriage, and it is clear from them that the mere fact of the marriage effects the legitimation *ipso jure*, no sort of recognition of the children by the parents being required. There seems to be no artificial limit placed to the inquiry into parentage; and I see that M. De la Grasserie, in the introduction to his translation of the code (p. ci) complains of its leaving so wide a door open for inquiries of this kind. This Code, unlike most others, does not exclude even children begotten in adulterous intercourse from the benefit of legitimation by subsequent marriage.[1]

21. *Sweden.*—From a translation of the Swedish Codes of 1734, published by M. Raoul de la Grasserie (Paris, 1895), chap. v. s. 1, it would appear that the mere fact of the marriage of the parents without more ado legitimates the ante-nuptial children in Sweden.

22. *Holland, Denmark, Switzerland.*—I gather from statements that I have from time to time come across in books that the rule of legitimation by or upon subsequent marriage prevails in one form or another in Holland, Denmark, and in most, if not all, of the cantons of Switzerland, but I have not as yet been able to get hold of a translation of the Dutch Code, and I have succeeded in finding the code of only one Swiss canton, *viz.* that of the Grisons.

The Laws of Certain Republics (other than the United States) on the American Continent.—

23. Turning now to the American Continent, but putting aside for the moment the United States, which can be more conveniently considered after we have dealt with the countries comprised in His Majesty's dominions, we find several countries now figuring as independent States, but which, having been originally acquired and settled by nations of the European Continent, still possess systems of law based to a considerable extent on the laws of those nations; and several of them have within the last fifty years framed for themselves codes in which the rule of legitimation by subsequent marriage, or some modification of it, is to be found.

I have been able to ascertain something of the law on this point as it stands in the codes of Peru, Chili, Brazil, Mexico, Venezuela, Argentina, Guatemala, Colombia, and Ecuador, but not enough to enable me to enter into much detail or to be always sure of my ground, because, in the case of the first four countries, I have only got the *résumés* of M. De la Grasserie, which, though we have every reason to be thankful for them, are only *résumés*; in the case of the next two I have had to refer to the original codes, which are in a language strange to me; and as regards the last two, all I have is the fact stated by M. De la Grasserie, that they, like some other of these American republics, have adopted the Chilian Code.

The codes of Chili, Mexico, Venezuela, Guatemala, and Argentina require, in addition to the marriage, a recognition of the children by the

[1] The reason for this will be found in the note to para. 11 *supra*.

parents as a condition of the legitimation; and all of them, except Venezuela, require that such recognition should take place before the marriage, or in the course of the celebration of the marriage, or within a short period of grace after. Venezuela apparently admits of the recognition taking place at any time after. I cannot find that such recognition is required in Peru or Brazil.

Several of these codes either forbid the *recherche de la paternité* in terms similar to those of the French Code, or subject it to certain limitations; but I have not been able to make out the effect which, under some of these codes, this has on the legitimation law.

24. **The Laws of the British Islands.**—*England and Ireland.*—When we turn to England we find things taking an opposite course to that which they took in the countries we have up to this considered. The practice regarding "mantle children" referred to in paragraph 3 above seems to have prevailed in England to some extent in very early times; but it is evident that it was not very commonly resorted to in times of which any record is preserved, and it is said to have been pronounced by Richard de Luci, Chief Justiciar under Henry II., to be of no legal effect[1]. Sir Travers Twiss, in his edition of *Bracton* (vol. 6, p. xxxi), conjectures that it may have been this decision that evoked Alexander III.'s letter, "Tanta est vis matrimonii," to the Bishop of Exeter referred to above (para. 10); but however that may be, it is beyond a doubt that before the close of the twelfth century a conflict had arisen in England between the law of the land and the law of the Church, the common lawyers having rejected the rule of legitimation by subsequent marriage adopted by the Church (Glanvill, l. 7, c. 15). As all know, this difference came to a head before the middle of the following century, and the rule was definitely rejected by the celebrated *nolumus* at Merton in the 20th H. III. (1236). This settled the law for England, and also, by virtue of certain steps then taken, for Ireland. The law so settled has been found suitable in these countries down to the present time; and though proposals for a change have been put forward, there seems to be no likelihood of its being altered within any time worth thinking of.

As to the arguments that were used in the controversy just referred to, we probably have a pretty complete view of all that was said on the side of the Church in the long and very acrimonious letter from the celebrated Bishop Grossetête to William de Raleigh, beginning at p. 66 of Luard's edition of the bishop's letters. In that letter Grossetête refers to the custom regarding "mantle children" in England and to the Roman Civil Law. He also charges the English law with inconsistency in refusing to recognise as legitimate

[1] As a mere ceremonial it seems to have survived a good while later. It is mentioned in connection with the legitimation by Statute of the children of John of Gaunt; and Fraser (*Parent and Child*, p. 39) speaks of it as still in use among the common people in Scotland.

children born before the marriage of their parents, while it admits the legitimacy of children begotten before the marriage, but born subsequently. But he naturally takes his stand mainly on Alexander's letter, "Tanta est vis matrimonii," and he endeavours, by the most fantastical and far-fetched analogies, drawn both from holy writ and from the course of nature, to prove that the *vis matrimonii* is adequate to produce the result attributed to it by the Pope! Further, he enters into a discussion of the doctrine of "the two swords," in order to show that the Pope's ruling was binding on the temporal authorities as well as on the spiritual. The whole letter is most curious, and interesting as a specimen of the style of argument in vogue in those days; but I do not think that there is anything in it that would aid the powers that now be in Jamaica in coming to a conclusion on the question before them.

As to arguments on the opposite side, Blackstone,[1] in his pious anxiety to justify the ways of the existing English law, gives a string of reasons, sound or unsound, of the modern type against the rule of the Canon Law, and suggests that reasons of that sort probably led the Parliament of Merton to decide as it did; but it is hardly likely that in the thirteenth century the question was discussed on what, in modern times, would be considered its real merits. The only ground on which William de Raleigh appears to have relied, in a curt and sarcastic answer which he seems to have sent to Grossetête (see Grossetête's reply, *op. cit.* p. 95), was the authority of Richard de Luci; and the probability is that, however Bracton may have blundered over the matter in other respects, he gives us all that was put forward on the side of the English lawyers when he refers to the fact that the English law was already settled and that the matter of inheritance was one in which the Pope had no right to interfere.

It is well to advert to all this, as otherwise some people with the bump of veneration abnormally developed may be disposed to attribute more weight to the decision at Merton than it really deserves in connection with the question before us. From certain points of view that decision is of high interest and importance, but with those points of view we have no concern here. All that it is material to note for our purpose is that the law of England as it now stands was settled nearly seven hundred years ago; that it has worked satisfactorily in England, and is not in the least likely to be altered there; that that same law is in force in Jamaica; and that, as the change proposed there would be apt to give rise to conflicts of law, it ought not to be made except for weighty reasons. Thus the only question is whether such reasons exist or, in other words, whether the proposed change would be likely to bring about the good results hoped for by those who have suggested it.

25. *Scotland.*—In Scotland the rule as to legitimation by subsequent marriage was adopted from the Canon Law (or, as some Scottish legal

[1] Vol. i. pp. 454-6.

authorities prefer to think, from the Civil Law), but at what precise time is a matter of dispute, though all seem to agree that it was at some time before the Reformation. The Law of Scotland at the present day on this matter seems to agree with the Canon Law in its main lines, no recognition of the children by the parents being required to effect the legitimation which takes place upon the marriage of the parents and even against their will (Fraser's *Law of Scotland relative to Parent and Child*, 1866, pp. 32 *et seq.*).

Scotchmen seem generally to be well satisfied with the working of the law as it stands, and would apparently be averse to any radical change. Some of them, moreover, have recently taken a prominent part in promoting the enactment of somewhat similar laws in certain of His Majesty's possessions abroad—a matter to which I shall have to refer later on.

26. *Isle of Man.*—The only work treating of the law of the Isle of Man which I have found available for reference is *The 'Lex Scripta' of the Isle of Man*, published by authority, and it dates from so long ago as the year 1819; but so far as I can make out from the available indexes to the Isle of Man Statutes, there has been no change in the law since then on the point with which we are concerned. At p. 60 of the *lex scripta* it is stated that in the year 1577 the customs of the island had been reduced to writing by the two Deemsters, and were then formally proclaimed. Among the customs so proclaimed we find at p. 70 the following: "Also we give for law that, if a man get a maid or young woman with child before marriage, and within a year or two after doth marry her, if she was never slandered or defamed with any other before, that child begotten before marriage shall have his father's corbe and his farm according to the custom of this isle." There seems to have been a further confirmation of this custom in the year 1794 (see p. 75). As to the earlier history of this custom we are told nothing, and it may be a thing of indigenous growth.

27. *Guernsey.*—The only work I have found relating to the laws of Guernsey is *An Essay on the Laws of Real Property in Guernsey*, by Peter Jeremie, 1841, and at p. 229 of it I find the following:

1. "The children referred to in the twenty-ninth article [relating to testamentary dispositions] are legitimate children—that is, all that are born in lawful marriage or before marriage—when a lawful marriage has eventually taken place between their parents, and at the time of whose birth there existed no legal impediment to such marriage, legitimation by subsequent marriage being admitted in Guernsey and throughout the Channel Islands."

The Common Law of Guernsey and Jersey is generally understood to be Norman Customary Law; but if the above extract correctly represents the Customary Law as it originally stood, it seems clear that that law was developed to some extent under the influence of the Canon Law.

28. *Jersey.*—The only work I have found regarding the Law of Jersey

is the *Laws, Customs, and Privileges in the Island of Jersey*, written by A. Jones Le Cras, a newspaper editor, in 1839. From p. 108 I take the following:

"Bastards, according to the customs of the island founded on those of ancient Normandy, become legitimate offsprings if the parents afterwards intermarry and acknowledge them, provided they were unmarried at the birth of such child or children; but it is an undecided question whether a son so previously produced would inherit in preference to one born subsequently to the marriage. The recognition is publicly made before the altar at the solemnisation of the bands of matrimony, the children standing between the father and mother. An act or certificate of the recognition is afterwards entered in the parish register and subscribed by the parents, the minister, etc."

The mode of recognition here so closely resembles that in the case of "mantle children" that the custom seems clearly to be in part of indigenous growth. Assuming the author's statement to represent the law as it existed in 1839, I cannot find, on referring to the indexes to the Statutes, that there has been any change made since.[1]

29. **The Laws of His Majesty's Possessions Abroad.**—I have next to consider the position in His Majesty's possessions abroad; and I will deal first with those possessions which we acquired by conquest or cession from some foreign State with a law of legitimation by subsequent marriage already prevailing in them, and in which we have allowed that law to remain in force with or without modifications in its form or details.

30. *Quebec.*—To begin with Quebec, which was included in the territories ceded to us by France in 1763. We found established in it the old French law of legitimation by subsequent marriage as it existed before the code, under which it will be remembered the marriage of the parents legitimated the ante-nuptial children *ipso jure* without any sort of recognition of those children by the parents being required. That law we seem to have allowed to remain in force (Burge, vol. i. p. 101). Since then there has been enacted a code called the "Civil Code of Lower Canada," Arts. 237-9 of which follow exactly Arts. 331-3 of the French Code Civil (para. 14 above), with this exception, that Art. 337 of the Lower Canada Code omits all mention of the recognition required by Art. 331 of the French Code, the authors of the Lower Canada Code having deliberately resolved to adhere to the main lines of the old law (Mignault, *Droit Civil Canadien*, t. ii. p. 118).

Art. 240 provides that "an illegitimate child has a right to establish judicially his claim of paternity or maternity, and the proof thereof is made by writings and testimony under the conditions and restrictions set forth

[1] Legitimation by subsequent marriage in Jersey was recognised in *La Cloche* v. *La Cloche*, 41 L.J. P.C. 51, and it was held that no particular form of recognition is necessary.

and maternity of the children have been declared by the decision of a Court (*sentenza*).

Art. 120.—Children legitimated by subsequent marriage acquire the rights of legitimate children on the day of the marriage if they have been recognised on that day or previously, or if their filiation was declared by the decision of a Court before the marriage.

Art. 121.—When the recognition or judicial declaration takes place after the marriage the children acquire the rights of legitimate children only on the day of such recognition or declaration.

Art. 130.—The legitimation does not take place in the case of a child born of persons one of whom at the time such child was conceived was married to a third person or was, owing to a legal prohibition, incapable of contracting marriage.

There does not seem to be any restriction placed on the *recherche de la paternité*.

36. *New Zealand, South Australia, Queensland, New South Wales, Victoria.*—I have, lastly, to notice under this heading the case of certain of our settled colonies which, having started with the Law of England, and having lived under it for many years, have quite recently passed legislative enactments establishing a mode of legitimating natural children whose parents marry one another. The legislative enactments so passed are as follows:

The New Zealand Legitimation Act, passed in 1894.

The South Australian Legitimation Act, passed in 1898, and amended in 1902.

The Queensland Legitimation Act, passed in 1899.

The New South Wales Legitimation Act, passed in 1902.

The Victoria Registration of Births, Deaths, and Marriages Act, passed in 1903.

This legislation is so important, as affording a precedent for what is now proposed in Jamaica, that I have suggested that copies of all the above Acts should be forwarded to Jamaica, if they have not already been sent. It is therefore unnecessary for me to set out the provisions of each Act in detail, but, as I have studied them all with some care, and as, moreover, I have had the advantage of perusing the most important debates on them in the various Legislative Councils and Assemblies, which Mr. Atchley, the librarian of the Colonial Office, has been so kind as to get together and forward to me, I will make a few observations on the more salient points.

37. New Zealand, it will be seen, was the first in the field, and the other four colonies have followed more or less closely the lines adopted by it. The Queensland Act and the New South Wales Act are indeed practically copies of the New Zealand Act. One feature common to all these Acts is that the mere fact of the parents marrying does not legitimate the

children. In order that a child may be legitimated he must be registered on the application of the father, or, as some of the Acts have it, on the application of the father and the mother, according to a procedure in the course of which a declaration must be made by the applicant or applicants to the effect that it is desired that the child should be "registered as the lawful issue" of the parents. Further, it seems clear that no declaration of parentage made by a Court would suffice as a substitute for such registration (see *supra*, para. 4). The result accordingly is that it is open to the parents to marry without legitimating the children; and thus these laws may be said to confer a sort of power of adoption conditional on marriage rather than to establish the true legitimation by subsequent marriage.

This course seems to have been deliberately taken. It was, I observe, objected to by one of the speakers in the South Australian Assembly, who contended, but in vain, that all children should be legitimated by the mere fact of their parents marrying one another. I may add that the titles of three of the Acts correctly describe them as Acts for the legitimation of children, not "*by*," but "*on*," the marriage of their parents; and the Victoria Act, which is made part and parcel of the Births, Deaths, and Marriages Registration Law of the Colony, is entitled, "An Act to Legitimise Children by Registration."

38. As regards the time at which the registration should be effected, New Zealand, and Queensland and New South Wales following it, allow registration at any time after the marriage, while Victoria allows it only within six months from the date of the marriage, or, in the case of marriages contracted before the passing of the Act, within six months from the passing of the Act. South Australia started in 1898 by allowing it only within thirty days before or after the marriage, thus practically requiring it to be part and parcel of the arrangements connected with the marriage (except in the case of marriages contracted before the passing of the Act, in which a period of about a year was allowed); but the Amending Act of 1902 allowed it at any time more than thirty days after the marriage, provided that the applicants proved before a magistrate that they were the parents of the children, in accordance with a procedure allowing of interested persons being heard in opposition. This amendment was said to have become necessary because ignorant or careless persons frequently omitted to register within the time allowed by the original Act.

39. As regards the date from which the legitimation takes effect, one would expect such Acts to make it take effect only from the date on which the second of the two conditions essential to it is fulfilled—that is to say where, as may happen under the South Australian Act, the registration precedes the marriage, from the marriage; and where the registration follows the marriage, from the registration. But all these Acts make the legitimation take effect retrospectively, and *that* not merely from the marriage, as we have seen is the

case under the law of Portugal (*supra*, para. 17), but from the birth of the child. We need not speculate as to all the results that might follow from this in cases where the registration does not take place until many years after the birth, and the child perhaps has for some time been of full age. It is enough to observe that, so far as concerns rights and interests that might meantime have accrued to other persons, a provision of this kind would have to be carefully guarded by savings. The savings that we find in the Acts we are now considering vary from one to the other, and it would be hardly safe for a person unacquainted with the general laws of the countries concerned to hazard an opinion as to their sufficiency; but I may say that I cannot but feel a doubt as to whether any of these savings have been sufficiently considered.

40. There seems to have been a considerable amount of difference of opinion as to whether the law should require the registration to be effected by both parents or whether it should allow it to be made by the father alone. Eventually New Zealand, Queensland, and New South Wales determined to allow it to be made by the father alone, it being apparently considered that the consent of the mother might be safely assumed. It seems hardly safe to assume that the mother will always willingly acquiesce, and it will be observed that South Australia requires her to join in the registration. The Victoria Act, too, requires the mother to join when she is living. If she is dead, the father can effect the registration alone.

41. As to the manner in which the proposals for legislation were received in the Colonies concerned, there appears to have been a considerable opposition at first in some places, proceeding, it would seem, from the legislative councils; but eventually it dwindled down or gave way.

The arguments in favour of and against the legitimation were in substance those to which I have referred in para. 6. The great argument urged in favour of it was that of justice to the illegitimate child. Miss Frances Willard was more than once quoted as having said that there never was an illegitimate child—that the "only illegitimate factor in the problem is the father." One speaker observed that "every child born sound and healthy is a gift to the nation and not an opprobrium," and referred—thereby recalling something in one of Shakespeare's plays—to the health and intellectual vigour for which bastards are remarkable.

The alleged tendency of such legislation to promote morality was but faintly insisted on, and in Queensland there was some vigorous opposition to the Bill in the Legislative Council, on the ground that its tendency would be the other way; but those who took this view mustered only four as against twelve on the division. It is curious to find it stated in the South Australian House of Assembly on October 5th, 1898, that the Churches were silent about the Bill.

42. I have only one more point to mention in connection with these

Acts, namely that all of them contain a clause excluding from the benefit of them a child at the time of whose birth there existed any legal impediment to the marriage of its parents, which, I take it, in these Colonies came practically to little more than the exclusion of the offspring of adulterous intercourse. There was a very strong opposition to this clause in the New South Wales Legislative Assembly, and there was a debate of several hours, but it was ultimately carried by thirty-eight votes against nineteen.

43. One would like, if one could, to look further back into the origin of this remarkable movement. It is indeed to a certain extent intelligible that once it was started it should go forward. The Colonies can legislate with a freer hand and a lighter heart than we can in England, and it is at least conceivable that a sense of the unmerited hardship inflicted on the illegitimate child might, when fully aroused, carry all before it. But has all this legislation been simply the result of a few earnest men pressing for the removal of this injustice, or were there other causes at work? We have unfortunately no information on this point available to hand, and there is no time to seek for it.

44. (7) **The Laws of the United States.**—The history of this matter in the United States is, as might be expected, very similar to its history in the British Colonies. When the territories comprised in three of those States—namely Louisiana, Arizona, and New Mexico, were acquired by the Union, there were already in force in them systems of law based on European systems, which recognised the rule of legitimation by subsequent marriage; and though many changes have taken place since then, that rule is, in one shape or another, still in force in those three States.

Louisiana.—Arts. 217-19 of the Louisiana Code, so far as they relate to legitimation by subsequent marriage, are copied from the French Code Civil; but the Louisiana law does not prohibit the *recherche de la paternité*, as the French Code does, except in the case of illegitimate children of colour claiming descent from a white father. It only lays down certain rules as to the mode of proof, which do not, however, seem to impose any very stringent limitations (the Louisiana Code, by Fuqua 1867; Wolff's *Revised Laws of Louisiana*, 1897).

Arizona.—All I can find on the subject in the Revised Statutes of Arizona, 1901, is in Art. 2127, which runs as follows:

"Whenever a man, having by a woman a child or children, afterwards intermarry with such woman, such child or children shall thereby be legitimised and made capable of inheriting his estate."

New Mexico.—All I can find in the Compiled Laws of New Mexico, 1897, is as follows:

"S. 2040. Illegitimate children become legitimated by the marriage of their parents."

45. The other States of the Union seem all to have started with the English Common Law in force; but here again we find a change has taken

place similar to that above described in the case of New Zealand and the majority of the Australian Colonies. In the United States that change began in the first half of the last century, and now the great majority of the States have adopted the rule of legitimation by, or on, the occasion of subsequent marriage.

Dana, writing in 1823 (abridgment head "Bastard") speaks of the Common Law rule as then in force in "our States generally." Burge, writing in 1838, mentions eleven States in which the rule of the Civil or Canon Law had, with or without modifications, come to be substituted for it. Stimson (*American Statute Law*), writing in 1886, mentions no less than thirty-six States in which this change had then taken place; and since then one State at least—New York (1 Cumming & Gilbert's *N. Y. Statutes*, p. 1096)—has been added to the list. Here, again, as in the case of New Zealand and Australia, it would be most interesting to trace the origin and progress of the revolution, if it were possible for us to do so. In the case of many States, no doubt, perhaps even in the case of most, the change may be the result merely of imitation, for many of the States seem given to following the lead of others in certain departments of legislation; but one would like to know how the movement originated. For us at this moment any inquiry as to that is of course out of the question; and it may be that, even if we had time to refer to the proper quarters, the information would, in the case of some States, not be forthcoming. In the margin of chap. 33, s. 5, of the Revised Laws of Massachusetts, 1901, there is a reference to a Massachusetts Statute, c. 147 of 1832, which I have not been able to get hold of, but which I gather, from what is said of it in a case in 8 Allen, at pp. 554-5, was one of the earliest Statutes that broke away from the Common Law on the point we are considering; and I find that the Court quote the Commissioners for the revision of the Statutes as having said, in regard to that Statute, that they "knew not the reasons on which the Statute itself was founded it being an innovation upon the law as immemorially practised and transmitted to us by our ancestors."

46. As to the conditions prescribed as essential to the legitimation in the Statutes of the various States now referred to—Stimson tells us that under fifteen out of the thirty-six Statutes he mentions, the mere fact of the marriage legitimates the children, while under the remaining twenty-one an acknowledgment or recognition by the father is required for this. But in Bouvier's *Law Dictionary* (1898) it is stated that in two of these latter States an acknowledgment by the mother also is required.

I have looked at the Statutes of five of the States mentioned in Stimson's list, which I gather may be taken as fair samples, *viz.* those of

Massachusetts (ed. 1901), chap. 133, s. 5, taken with chap. 140, s. 3;
Pennsylvania (ed. 1896), "Marriage," s. 16;
California (ed. 1886), s. 215;
Michigan (ed. 1899), s. 1867;

Iowa (ed. 1888), s. 3391;
and also those of
New York (ed. 1902).

I find that in all of them the rule is laid down in a few words and in the most general terms. In all but Massachusetts it is, in effect, simply enacted that the marriage of the parents shall legitimate the children born to them before it. The Massachusetts Law, on the contrary, requires an acknowledgment by the father in addition. It runs as follows: "An illegitimate child whose parents have intermarried, and whose father has acknowledged him as his child, shall be considered legitimate."

Time unfortunately does not admit of my looking into the reports of cases decided under these or any of the other Acts, with a view to ascertaining how they have been construed in practice; but I should fear that laws which attempt to dispose of a complicated matter of this kind in a few words, as the six Statutes above referred to do, would be likely at times to give rise to very knotty questions.

SURETYSHIP FROM THE STANDPOINT OF COMPARATIVE JURISPRUDENCE.

[*Contributed by* HENRY ANSELM DE COLYAR, *Barrister-at-Law, Author of "A Treatise on the Law of Guarantees," etc.*]

FEW, if any, contracts can boast a greater antiquity than that of suretyship. In proof of this assertion many passages in the Old Testament may be cited,[1] and notably the one conveying a wholesome warning to intending sureties in these words, namely: "He that is surety for a stranger shall smart for it, and he that hateth suretyship is sure."[2] That distrust of others, sometimes disguised under the name of *caution*, which more or less enters into the daily transactions of life, especially where pecuniary risk of any kind is involved, is necessarily most conspicuous in this contract (being indeed denoted by its very name),[3] whereby responsibility is assumed by one person for another, in order that trust may be reposed in, or credit given to, the latter.[4] In the mercantile world suretyship is necessarily

[1] Gen. xliii. 9, xliv. 32; Prov. vi. 1, xvii. 18, xx. 16, xxii. 26; Job xvii. 3; and see Philem. 18, 19.

[2] Prov. xi. 15. In like manner we read in treatise *Hug. Grotii De Jure Belli ac Pacis*, Liber III., Cap. XIII., Par IV.: "Miserabile enim est, ut ait pater Quintilianus, sponsoris periculum. Tamen tam durus creditor contra jus stricte dictum nihil facit."

[3] In *England* and *America* the contract of suretyship is termed "guarantee" or "guaranty." In *Scotland* it is called "cautionary obligation," the surety being styled "cautioner." In the existing Codes Civil the surety is termed "caution" and the obligation itself "cautionnement" or else equivalent terms are used (see Codes Civil France and Belgium, 2011 *et seq.*; Portugal, 818; Spain, 1822; Italy, 1898; Holland, 1857).

[4] Sometimes distrust extends even to the surety himself. For occasionally "a person who can't pay gets another person who can't pay to guarantee that he can pay" (*Little Dorrit*, by Charles Dickens, Cap. III.). In such cases, in *England* (see *Craythorne* v. *Swinburne*, 1807, 14 Ves. 160) and elsewhere, too (see Codes Civil France and Belgium, 2014; Portugal, 827; Spain, 1823; Lower Canada, 1934; Van Der Linden's *Institutes of Holland*, p. 120), a surety for a surety is procurable, who is generally liable to the same extent as the original surety (Portugal, 829, 847; Spain, 1846), and whose guarantee should be given in terms clear, express, and positive (see Portugal Code, Art. 828). A surety's solvency may likewise be made the subject of *insurance* (see *Seaton* v. *Heath*, *Seaton* v. *Burnand*, 1900, A.C. 135). In some countries a creditor is entitled to have an insolvent surety replaced by another, provided the original surety was not selected by the creditor (see Codes Civil France and Belgium, 2020; Portugal, 825; Spain, 1829; Italy, 1905; Holland, 1865; Lower Canada, 1940; Van Der Linden's *Institutes of Holland*, p. 119).

of very common occurrence in the complicated transactions of civil life, and the contract giving rise to it is the one in which bankers, traders, shippers, merchants, and commercial men of all kinds are deeply interested, and in regard to which information is constantly sought. "Without this contract the course of business and commerce would be prodigiously impeded and disturbed,"[1] while, but for the security afforded by it, many important and beneficial schemes and enterprises would have to be abandoned by their authors and promoters. For it frequently happens that a person's most valuable present assets consist not of tangible and visible wealth, capable of being estimated, with a view to its being offered as security, but of persons of means and position, who, believing in him and in his projects, are willing to guarantee the fulfilment by him of such obligations as he may contract. Springing, then, as suretyship does, from the needs of mankind, and from what may truly be regarded as a universal instinct of self-protection, it is not surprising to find that the contract creating it is not indigenous to any particular country, but, on the contrary, is common to the municipal laws of all civilised nations. It is, therefore, a peculiarly fit subject for consideration in the pages of this Journal, though the rigid limits of space necessarily confine the present article to a few notes.[2]

The Basis of the Contract of Suretyship.—In all countries the contract of suretyship involves the existence of a valid principal obligation,[3] which

[1] *Per* Kent C.J. in *Ludlow* v. *Simond*, 1805, 2 Caine's Cas. in Error, at p. 58.

[2] Comparison of all existing legal systems with our own has not been attempted in dealing with the wide and intricate subject of suretyship, though most of the existing Codes Civil have been consulted. In some of our Colonies the French Code Civil (late Code Napoleon) or modifications thereof prevails. In Mauritius the Code Napoleon was substantially adopted, as far back as April 21st, 1808, by an *arrêté* of that date. The Code of Lower Canada is obviously based on the existing French Code Civil, as are also the two Codes Civil of Egypt, namely, the one in use by native tribunals, and the one invoked before tribunals for mixed suits. The new Code Civil of Germany of 1896 is also founded upon the French Code Civil, though by no means identical with it. The Codes Civil of France and Belgium seem to be practically identical, the numbers even of the articles corresponding; while, so far as the law of suretyship is concerned, the only difference between the two Codes is in Art. 2040, the final paragraph of which (see French Code, Art. 2040) is omitted in the Belgian Code.

[3] See Pothier's *Law of Obligations*, Evans's edition, vol. i., p. 229; Burge *On Suretyship*, p. 3; Codes Civil France and Belgium, 2011 *et seq.*; Spain, 1822, 1824; Portugal, 818, 822; Italy, 1898, 1899; Holland, 1857; Germany, 765; Lower Canada, 1929, 1932; Egypt (mixed suits), 605; *ibid.* (native tribunals), 496; Van Der Linden's *Institutes of Holland*, p. 117. An obligation may be either civil or natural (Molitor's *Les Obligations*, vol. i., p. 26; Savigny's *Le Droit des Obligations*, vol. i., p. 47; Pothier's *Law of Obligations*, Evans's edition, vol. i., pp. 103, 108). The former is capable of being enforced by action, while the latter is not (*ibid.* and see Johnston's *Civil Law of Spain*, p. 167). As to whether a natural obligation can be guaranteed, see Savigny's *Le Droit des Obligations*, vol. i., s. 8, p. 63; and *ibid.*, s. 11, p. 105; Molitor's *Les Obligations*, vol. i., p. 36, *et seq.* The Code Civil of Lower Canada permits of suretyship in respect of a purely natural obligation (Art. 1932), and, *semble*, so also does the Law of Scotland

may be formed previously, contemporaneously, or subsequently by another person, who is called the principal debtor.[1] In other words, the contract of suretyship is essentially *accessory* in character,[2] the law of contract giving as its very foundation, without which it must fail, the existing, or at least contemplated, future liability of a third person.[3] Consequently the obligation of the principal debtor is not extinguished by that of the surety, which, instead of operating as a *novation*, leaves the principal obligation intact, and becomes subsidiary thereto.[4] Moreover, as will presently be seen, whatever extinguishes the principal obligation, determines that of the surety,[5] whose liabilities are in law dependent upon those of his principal, so that when the latter cease the former do so likewise.[6] So fully was the accessory character of the contract of suretyship acknowledged by the old Roman Civil Law, that not only was it required that a contract should relate to the same subject, and be of the same nature as the principal obligation,[7] but, in addition, if the surety undertook by his contract a greater liability than that of the principal, *quantitate, die, loco, conditione, modo*, his undertaking was wholly void, and not merely *pro tanto*.[8] This subtle strictness of the Roman Law has been unanimously rejected by the

(Erskine's *Principles of the Laws of Scotland*, 20th edition, p. 386). By various Codes Civil suretyship in respect of an obligation "non-valable" is null and void, save where the invalidity proceeds from the personal incapacity of the principal debtor (Codes Civil France and Belgium, 2012; Spain, 1824; Portugal, 822; Italy, 1899; Holland, 1858; Lower Canada, 1932), though in some countries the mere personal incapacity of a son under age to borrow will suffice to vitiate a suretyship in respect of the loan made to him (Spain, 1824; Portugal, 822, 1535, 1536). The Egyptian Codes, however, uphold a contract of suretyship expressly entered into "in view of the debtor's want of legal capacity" to contract a valid principal obligation (see Arts. 605, 496 *supra*). In *Portugal* a surety for an invalid principal obligation remains liable till the latter has been legally rescinded (Code Civil, 822, s. 1).

[1] *Per* Lord Selborne in *Lakeman* v. *Mountstephen*, 1874, L.R., 7 H.L., at p. 24; Pothier's *Law of Obligations*, Evans's edition, vol. i., p. 256; Burge *On Suretyship*, pp. 3 *et seq.*; Codes Civil Germany, 765; Spain, 1825; De Colyar's *Law of Guarantees, etc.*, 3rd edition, pp. 66 *et seq.*

[2] Molitor's *Les Obligations*, vol. i., p. 25; Johnston's *Civil Law of Spain*, p. 243; Pothier's *Law of Obligations*, Evans's edition, vol. i., p. 228-9; Erskine's *Principles of the Laws of Scotland*, 20th edition, p. 385; Holland's *Jurisprudence*, 6th edition, p. 268; *Ferry* v. *Burchard*, 1852, 21 Connecticut Reports, at p. 602; and see German Code Civil, 767; Bell's *Principles of the Laws of Scotland*, 10th edition, s. 245, p. 108.

[3] *Per* Lord Selborne in *Lakeman* v. *Mountstephen*, *supra*; *per* Wills J. in *Mountstephen* v. *Lakeman*, 1871, L.R. 79 B. at p. 197.

[4] See *per* Lord Kenyon in *White* v. *Cuyler*, 1795, 1 esp. 200; Pothier's *Law of Obligations*, Evans's edition, vol. i., pp. 229-30; Van Der Linden's *Institutes of Holland*, pp. 117, 118; Burge *On Suretyship*, p. 3.

[5] *Infra*, and see Van Der Linden's *Institutes of Holland*, p. 118.

[6] *Per* Collins L.J. in *Stacey* v. *Hill*, 1901, 1 K.B., at p. 666.

[7] Dig. 46, 1, 42; Burge *On Suretyship*, p. 4; Pothier's *Law of Obligations*, Evans's edition, vol. i., p. 36; Hunter's *Roman Law*, 4th edition, p. 571; but see *contra* Molitor's *Les Obligations*, vol. i., p. 36.

[8] Pothier's *Law of Obligations*, Evans's edition, vol. i., p. 230; Dig. 46, 1, 16.

existing Codes Civil,[1] and a guarantee which exceeds the principal obligation instead of being treated as wholly void, merely has its limits reduced to those of the latter,[2] as there cannot be more in the principal than there is in the accessory.[3] Neither in *England*[4] nor *America*[5] can the surety's obligation exceed that of the principal debtor. Should it do so, it is conceived that the suretyship would not be void, but that, so far as the excess is concerned, it would be held that there was no suretyship, though possibly that an original liability had been contracted unless the circumstances of the case negatived such a conclusion.

It was never, however, necessary, even under the Roman Law, that the surety's obligation should *equal* that of the principal.[6] On the contrary, it could, without impairing its validity, be in all respects *less* onerous,[7] as it may still be in all countries at the present day.[8] Moreover, it might, and may now, relate either to a present and ascertained debt or to a liability, of an indefinite and uncertain amount, to be contracted at some future date[9] by another person, who need not even be aware of the surety's obligation.[10] Where, however, the agreement of the surety *precedes* that of the principal debtor, it is, in English Law, revocable till acted upon,[11] as was also the old

[1] Burge *On Suretyship*, p. 5.

[2] Codes Civil France and Belgium, 2013; Portugal, 823; Spain, 1826; Italy, 1900; Holland, 1859; Lower Canada, 1932-3; Van Der Linden's *Institutes of Holland*, p. 118. See also Egyptian Codes (mixed suits), 606; *ibid.* (native tribunals), 497.

[3] Hunter's *Roman Law*, 4th edition, p. 571. The Indian Contract Act, 1872, provides that the liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract (s. 128).

[4] See Theobald's *Law of Principal and Surety*, p. 3; and see Bell's *Principles of the Laws of Scotland*, 10th edition, p. 110.

[5] *Per* Storrs J. in *Ferry* v. *Burchard*, 1852, 21 Connecticut Reports, at p. 602.

[6] The *Lex Cornelia* (B.C. 81) provided that certain sureties (*i.e.* those created by *stipulatio*) should not bind themselves for the same debtor beyond 20,000 sesterces (Gai. iii. 124-5).

[7] Pothier's *Law of Obligations*, Evans's edition, vol. i., p. 230; Hunter's *Roman Law*, 4th edition, p. 571.

[8] Codes Civil France and Belgium, 2013; Spain, 1826; Portugal, 823; Italy, 1900; Holland, 1859; Lower Canada, 1933; Egypt (mixed suits), 607; *ibid.* (native tribunals), 497; De Colyar's *Law of Guarantees, etc.*, 3rd edition, pp. 233 *et seq.*; Theobald's *Law of Principal and Surety*, p. 3; Fell *On Guarantees*, 2nd edition, pp. 101 *et seq.*; Brandt *On Suretyship, etc.*, s. 219. Where the liability of a surety is not necessarily co.-extensive with that of the principal debtor, but is limited to a specific amount, difficult questions are apt to arise as to whether, subject to such limit, it is given in respect of the whole debt or of a part thereof only equal to the limit (see *Ellis* v. *Emmanuel*, 1876, 1 Ex.D. 157; *Hobson* v. *Bass*, 1871, 6 Ch. App. 792; and see Brandt *On Suretyship*, s. 219).

[9] See Codes Civil Spain, 1825, 1827; France and Belgium, 2016; Germany, 765.

[10] Codes Civil France and Belgium, 2012; Spain, 1824, 1835; Portugal, 822, 834, 838; Italy, 1899; Holland, 1858; Lower Canada, 1934. It has been held in England that there is no privity between the surety and the principal debtor, as the former contracts not with the latter, but with the creditor (*Per* Parke B. in *Bain* v. *Cooper*, 1842, 1 D.N.S. 11, 14; and see Codes Civil Spain, 1835; Portugal, 834).

[11] *Offord* v. *Davies*, 1862, 12 C.B.N.S. 748; *Pope* v. *Andrews*, 1840, 9 C. & P. 564.

Roman contract of *Mandatum*,[1] though, on the other hand, the surety termed *fidejussor*[2] could never withdraw from his obligation (*fidejussio*) after he had once entered into it.[3]

The *American* law, unlike that of other countries, seems to distinguish between a *surety* and a *guarantor*, the former being really jointly liable with the principal debtor; while, on the other hand, the latter is liable only in default of the principal, and incurs no original liability whatever.[4] It is important to bear in mind this distinction when American text-books or cases are cited on the subject of principal and surety.

The Different Kinds of Sureties and of Contracts of Suretyship.—Several of the existing Codes Civil recognise three classes of sureties, namely, conventional, legal, and judicial,[5] while in this connection the Spanish Code, it is to be noticed, mentions that sureties may either be gratuitous or for a valuable consideration.[6] The first class of sureties is the result of agreement between the parties, the second is required by law, and the third is ordered by judicial authority.[7] The second and third classes of sureties do not in all Codes Civil possess the same rights and privileges as are reserved to sureties created by contract, and are in some Codes Civil dealt with more or less apart.[8] In *England* and *America* and other countries, besides those already referred to, sureties may also, with propriety, be similarly divided. In this connection it may be mentioned that, for certain purposes, the different kinds of suretyship are distinguishable as follows, viz. (1) Those in which there is an agreement to constitute, for a particular purpose, the relation of principal and surety, to which agreement the creditor thereby secured is a party; (2) Those in which there is a similar agreement between the principal and surety only, to which the creditor is a stranger; and (3) Those in which, without any such contract of suretyship, there is a primary and a secondary liability of two persons for one and the same debt, the debt being as between the two, that of one of those persons only, and not equally of both, so that the other, if he should be compelled to pay it, would be entitled to reimbursement from the person by whom (as between the two) it ought to have been paid.[9]

In the case of what are commonly termed, in this country at least,

[1] Hunter's *Roman Law*, 4th edition, p. 566.

[2] See *infra*, where reference is made to this kind of surety.

[3] Hunter's *Roman Law*, 4th edition, p. 566.

[4] Brandt *On Suretyship, etc.*, s. 1 *et seq.*, and cases there cited.

[5] Codes Civil France and Belgium, 2011, 2040, *et seq.*; Spain, 1823; Lower Canada, 1930; and see Code of Germany, 232, 273; Johnston's *Civil Law of Spain*, p. 243; Van Der Linden's *Institutes of Holland*, p. 119; Pothier's *Law of Obligations*, Evans's edition, vol. i., p. 247.

[6] Art. 1823.

[7] Code Civil Lower Canada, 1930.

[8] Codes Civil France and Belgium, 2040-43.

[9] *Per* Lord Selborne L.C. in *Duncan Fox & Co.* v. *North & South Wales Bank*, 1880, 11 App. Cas., at p. 11.

mercantile guarantees, it is important to distinguish between those which concern one particular transaction and those which are intended to cover a series of transactions, and which, on this account, are termed continuing guarantees,[1] which may either be limited in the amount of the cover provided by them or else be unlimited, in which latter case the cover is co-extensive with the liability incurred by the principal debtor himself. Amongst *continuing* guarantees fidelity bonds are still of common occurrence in England and elsewhere. The *Del Credere Guarantee*, as it is sometimes called, whereby a mercantile factor, bank agent, insurance broker, or other mandatory engages for the solvency of persons who purchase or deal with him in the concerns of his principal, is primarily a contract of mandate, and only incidentally one of cautionary, and is not therefore governed by the same enactments or considerations.[2]

The Formation of the Contract of Suretyship.—This contract is sometimes termed a *unilateral* contract,[3] presumably because one of the parties thereto contracts an engagement to another, who is not necessarily bound in the first instance, and whose assent to what is offered by the surety may, and often is, evidenced not in express words, but by compliance with some condition subject to which the guarantee was made.[4] In all countries, however, the contract of suretyship, like every other contract, involves the assent of the parties thereto,[5] though, as already stated, not of the principal debtor himself.[6] On the other hand, however, while in *England* and the *United States of America* every contract, not excepting that of suretyship,[7] must, if not under seal, be supported by *valuable* consideration, in some countries this ingredient is not insisted upon, at least where the parties have, by adopting certain legal formalities, indicated a serious intention of contracting a valid and effectual obligation.[8] In *Scotland*, where, in accordance with the Canon Law, every paction produceth action, a consideration has never been, and is not now, necessary to the validity of any contract,[9] while, on the other hand, in *India*, though

[1] The Indian contract, 1872, thus defines a continuing guarantee; viz. "A guarantee which extends to a series of transactions is called a 'continuing guarantee'" (s. 129).

[2] Bell's *Principles of the Laws of Scotland*, 10th edition, p. 120.

[3] Code Civil of France, explained by J. A. Rogron, vol. ii., tit. xiv., p. 2614; Fell *On Guarantees*, 2nd edition, p. 43.

[4] *Kennaway* v. *Treleavan*, 1839, 5 M. & W. 498, 501; *Whitehead* v. *Sproson*, 1861, 30 L.J. Ex. 265; *Offord* v. *Davies*, 1862, 12 C.B.N.S. 748.

[5] Story *On Contracts*, 5th edition, vol. ii., s. 1108; De Colyar's *Law of Guarantees, etc.*, 3rd edition, pp. 2 *et seq.* Assent is required to validity of all contracts by Codes Civil France and Belgium, 1108; Portugal, 643, 647, *et seq.*; Spain, 1258, 1261; Italy, 1104; Lower Canada, 984, etc., and by other codes likewise.

[6] *Supra*, and see Codes Civil France and Belgium, 2014; Portugal, 821; Spain, 1823; Italy, 1901; and Pothier's *Law of Obligations*, Evans's edition, vol. i., p. 257.

[7] De Colyar's *Law of Guarantees, etc.*, 3rd edition, pp. 21-2 *et seq.*; Story *On Contracts*, 5th edition, vol. ii., s. 1110; Johnston's *Civil Law of Spain*, p. 243.

[8] Pothier's *Law of Obligations*, Evans's edition, vol. i., p. 24; vol. ii., p. 19.

[9] Stair 1, 10, 7; Lord Mackenzie's *Roman Law*, 6th edition, p. 231; *Encyclopædia of*

no consideration is needed to support the contract of agency,[1] that of suretyship appears to require one, which, however, may, it is enacted, consist (as in *England* and *America*) of anything done, or of any promise made for the benefit of the principal debtor by the person receiving the guarantee.[2] By the law of *Ceylon* all contracts whatsoever, including deeds, require a consideration to support them,[3] though, in the case of deeds, the consideration is, in the first instance, presumed.[4] On this subject the Code Civil of *Lower Canada* provides that a contract without a consideration, or with an unlawful consideration, has no effect.[5] The Code Civil of *Spain* expressly provides, as already mentioned,[6] that suretyship may be gratuitous or for valuable consideration.[7] Many Codes Civil enact that an obligation *sans cause* shall have no effect.[8] This may perhaps be taken to mean that a contract must not be motiveless, but inspired by benevolence, friendship, or other proper feeling, if not actuated by commercial or business reasons.[9] Moreover, several Codes Civil expressly provide that suretyships must never be presumed, but must always be express.[10]

As regards the persons who can become sureties, in some countries women (whether single or married) are disqualified,[11] as they also were by the Roman Law, owing to the *Senatus Consultum Velleianum*, passed in the reign of Claudius (A.D. 46), which, however, was eventually modified *temp* Justinian.[12] In *France* this disqualification was abrogated in 1606

Accounting, vol. iii., tit. Guarantee, p. 225. A cautionary obligation is commonly an engagement of friendship and gratuitous, and in an old case it was held to be *pactum illicitum* for the cautioner to stipulate for a valuable consideration *from the principal debtor* (Bell's *Principles of the Laws of Scotland*, 10th edition, p. 108; *King* v. *Ker*, 1711, Morison's *Digest of Decisions of the Court of Session*, vol. xxiii., p. 9461).

[1] Indian Contract Act, 1872, s. 185.

[2] *Ibid.*, s. 127.

[3] Thompson's *Institutes of the Laws of Ceylon*, vol. ii., p. 322.

[4] *Ibid.*, p. 323.

[5] Art. 989.

[6] *Supra*.

[7] Art. 1823.

[8] See Codes Civil France and Belgium, 1131; Spain, 1274 *et seq.*; Portugal, 659; Italy, 1109; Holland, 1371; Pothier's *Law of Obligations*, Evans's edition, vol. i., p. 24. The Roman Law, while dispensing in the case of formal contracts (*i.e.* by *stipulatio*) with the necessity of a consideration, nevertheless provided that a *stipulatio*, made *sine causâ*, could not be enforced (Hunter's *Roman Law*, 4th edition, p. 598).

[9] Morice's *English and Roman Dutch Law*, pp. 72 *et seq.*

[10] Codes Civil France and Belgium, 2015; Spain, 1827; Lower Canada, 1935.

[11] Codes Civil France and Belgium, 1124; Spain, 1263; Portugal, 819-20. The last-named Code, while forbidding women who are not traders to become sureties, makes certain reservations and exceptions in favour of such as are traders.

[12] Novel 134, Cap. 8. Apparently Justinian wished to make the suretyship of a wife not only voidable, but absolutely void; but the jurisconsults very soon applied to the new Imperial Law the principles which they had already applied to the *Senatus Consultum Velleianum*, and declared that a wife could renounce the benefit introduced for her advantage, and bind herself as surety (*per* de Villiers C.J. in *Oak* v. *Lumsden* 3 Juta's Sup. Court Reports, at p. 144).

by an edict of Henry IV., which, however, was not registered in all parts of France, and therefore did not extend throughout the entire country;[1] but eventually the Code Civil established, as a general principle of French Law, that all persons shall be capable of contracting,[2] while, however, rendering married women incapable of doing so, "dans les cas exprimés par la loi."[3] In *England* the Married Women's Property Acts, 1870 to 1893, have largely mitigated the previous incapacity of married women to contract, which incapacity, however, did not extend to *single* women, the English Law never having adopted the Roman Law doctrine of *perpetua tutela mulierum*.[4] In *Lower Canada* a married woman, if possessed of separate estate, can contract, but not otherwise.[5] In *Malta*, save in certain excepted cases, she is prohibited from contracting.[6] In *America* a married woman cannot, unless enabled by Statute to do so, become surety for her husband or a stranger.[7] In certain States,[8] however, such Statutes have, it seems, been enacted.[9]

Though a minor is, by various Codes Civil, rendered incapable of contracting,[10] his obligation may nevertheless be guaranteed by a surety, as such an obligation could only be set aside by means of an exception purely personal to him (the minor).[11] In *England*[12] and *America*[13] a surety's promise to answer for an infant is also binding, but it is regarded as the surety's original promise, unless the liability of the infant is one which the latter can legally incur.[14]

Authentication of the Contract of Suretyship.—The legal formalities required to constitute the contract of suretyship exhibit considerable differences in various countries. Going back to the earliest times, it was an

[1] Pothier's *Law of Obligations*, Evans's edition, vol. i., p. 248.

[2] Art. 1123.

[3] Art. 1124; and see Codes Civil Portugal, 644, 819, 820; Spain, 1263; Italy, 1105; Holland, 1366.

[4] Chitty *On Contracts*, 13th edition, p. 202.

[5] Code Civil Lower Canada, 177.

[6] Ordinance VII. of 1868 (revised by Ordinance No. 1 of 1870), Part II., Tit. IV., Arts. 670, 677–8.

[7] Brandt, *Law of Suretyship, etc.*, s. 4.

[8] *e.g.* Nebraska, Dakota.

[9] See Fisk Beach's *Law of Contracts*, vol. ii., ss. 1304, 1306.

[10] Codes Civil France and Belgium, 1124; Spain, 1263; Italy, 1106, 1303; Holland, 1366; Portugal, 98. The Egyptian Code (mixed suits) provides by Art. 605 that a surety's contract made in respect of a void principal obligation shall be good, if it was expressly made, on account of the principal debtor's want of legal capacity.

[11] Codes Civil France and Belgium, 2012; Spain, 1263, 1823; Portugal, 822; Italy, 1901; Holland, 1860; Lower Canada, 1932. See *supra*, where special reference is made to certain *unique* provisions of Spanish, Portuguese, and Egyptian Codes on this subject.

[12] De Colyar's *Law of Guarantees, etc.*, 3rd edition, p. 97; *Harris* v. *Huntbach*, 1757, 1, Burr. 373.

[13] Brandt, *On Suretyship, etc.*, ss. 44, 128, 196.

[14] De Colyar's *Law of Guarantees, etc.*, 3rd edition, p. 98.

ancient custom in suretyship for the surety to give his hand to, or strike hands with, the creditor, thereby obliging himself to the payment of the debt, in case of the insolvency of the principal debtor.[1] In Roman Law the formalities to be observed for the constitution of the contract of suretyship depended on the kind of sureties to be created. Thus, while the sureties termed, respectively, *sponsores*,[2] *fidepromissores*,[3] and *fidejussores*,[4] could only bind themselves by *stipulatio*,[5] on the other hand, a limited kind of suretyship could be formed by means of the formless contracts of *mandatum*[6] and *pactum de constituto*.[7] Writing, however, was never necessary to the validity of the contract of suretyship, though it was sometimes resorted to, as affording the best means of proving the existence of such a contract.[8] Thus, if a person acknowledged himself in writing to be a *fidejussor*, it was presumed against him that all requisite formalities had been complied with.[9] The existing Codes Civil do not usually prescribe any special formalities for the authentication of the contract of suretyship, which, like any other contract, must be proved by the person demanding its fulfilment,[10] and can usually be made [where less than a prescribed sum, generally amounting to about £6 of our money, is involved] verbally in the presence of witnesses, and in other cases, *sous signature privée*, or else by a judicial or notarial instrument.[11] The *Portuguese* Code Civil expressly provides that the surety-

[1] Job. xvii. 3; Prov. xxii. 26.

[2] None but Roman citizens could become *sponsores* (Gai. iii. 93).

[3] Even aliens could be *fidepromissores*. Neither they nor *sponsores* could bind their heirs nor become accessory to any principal obligation formed otherwise than by *stipulatio* (Gai. iii. 119-20). Both these classes of sureties had practically the same legal position (Gai. iii. 118).

[4] *Fidejussores* being at liberty to guarantee any kind of principal obligation (Gai. iii. 119*a*) and to transmit their liability to their successors (Gai. iii. 120) eventually (*temp* Justinian, at all events) supplanted both *sponsores* and *fidepromissores*, who, however, were not actually abolished.

[5] This formal contract, or rather means of making one, was entered into by the use of a prescribed question, put by the obligor to the obligee, to which the latter gave the prescribed answer. Thus, in the case of a *fidejussor* the question and answer were as follows: "Fidejubes?" (*i.e.* "Do you make yourself a *fidejussor*?") "Fidejubeo" (*i.e.* "I do make myself *fidejussor*"). See Gai. iii. 110 *et seq.*; *Insts. Just.*, tit. xv. 1.

[6] In this contract suretyship was really *implied* by law whenever one person, at the request of another, lent money to a third person (Hunter's *Roman Law*, 4th edition, p. 566). By the new German Code (Art. 778) a kind of suretyship, distinguishable from what is therein termed *mandat*, is created whenever, at the request of another, credit has been given to a third person in his own name or on his own account.

[7] By means of this contract any person could oblige himself to discharge, on a day named, an existing obligation of another, in consideration of forbearance meanwhile, by the creditor to sue the principal debtor.

[8] Dig. 45, 1, 30; Roby's *Roman Private Law*, vol. ii., p. 13.

[9] Dig. 45, 1, 30.

[10] Codes Civil France and Belgium, 1345; Portugal, 2405; Spain, 1214; Holland, 1902; Italy, 1312; Lower Canada, 1203.

[11] See Codes Civil France and Belgium, 1341; Portugal, 2506; Spain, 1244; Italy, 1341 *et seq.* Van Der Linden's *Institutes of Holland*, p. 120; Pothier's *Law of Obliga-*

ship and its extinction prove themselves by all the modes established by law for the proof of the principal contract.[1] On the other hand, the *German* Code Civil requires a *written* verification of the surety's promise, at least in cases where he has not executed the principal obligation.[2] In the United Kingdom written evidence of the promise of the surety, though not of the consideration for it, is now by Statute made necessary,[3] though originally this was not required.[4] It is also obligatory in the United States, where the provisions of the Statute of Frauds have substantially been adopted.[5] Likewise in the *Australian Colonies*,[6] *Jamaica*,[7] and *Ceylon*,[8] while in *India*, on the other hand, a guarantee may be either written or oral.[9]

Rights of Creditor against Surety.—This subject must be treated with brevity. The creditor's rights against a surety do not accrue until after default has been made by the principal debtor. By the Roman Law, if a person was liable before such default, he was regarded as a co-promiser rather than as a surety.[10] In *America*, while, as already mentioned, a guarantor is only liable after the principal's default, a surety, on the other hand, is, in the first instance, answerable for the debt for payment of which he has made himself responsible.[11] Most, if not all, of the existing Codes Civil treat the surety as not liable till after the principal's default,[12] while in *England*, where the same rule prevails,[13] the surety need not even be

tions, Evans's edition, vol. i., p. 257; Burge *On Suretyship*, p. 19. The Portuguese Code, save where otherwise prescribed thereby, does not regard proof by one witness as sufficient (Art. 2512).

[1] Art. 826.

[2] Art. 766.

[3] In *England*, by Stat. Frauds 29 Car. II., c. iii. p. 4; Lord Tenterden's Act, 9 Geo. IV., c. 14, s. 6. In *Scotland*, by Mercantile Law Amendment Act (Scotland), 1856 (19 & 20 Vict., c. 60, s. 6). In *Ireland*, by Irish Stat. Frauds 7 Will. III., c. 12, s. 2.

[4] Chitty's *Commercial Law*, vol. iii., p. 317.

[5] Brandt *On Suretyship, etc.*, p. 49.

[6] See Victoria Instruments Act, 1890, 208; New South Wales Guarantees Laws Amendment Act, 1882 (46 Vict., No. IV.), s. 1; Queensland Statute of Frauds and Limitations Act, 1867 (31 Vict., No. 22), ss. 5 and 6; Tasmanian Mercantile Law Amendment Act, 1858 (22 Vict., No. 3), s. 1; South Australian Mercantile Law Amendment Act, 1861 (24 & 25 Vict., No. 3), s. 20; Western Australian Adoption of Imperial Acts Act, 1867 (31 Vict., No. 8); New Zealand Mercantile Law Act, 1880 (44 Vict., No. 12), s. 41.

[7] 9 Geo. IV., c. 20, s. 6; and see Law 17 of 1872, s. 6.

[8] Ordinance of Frauds and Perjuries (No. 7 of 1840, s. 21), which in many respects is nearly identical with the English Statute of Frauds (Thomson's *Institutes of the Laws of Ceylon*, vol. ii., p. 327).

[9] Indian Contract Act, 1872, s. 126.

[10] Heringius de Fidejussoribus, c. 22; Hunter's *Roman Law*, 4th edition, p. 568.

[11] *Per* Hubbard J. in *Curtis* v. *Dennis*, 1844, 7 Metcalf 510; *per* Maxwell J. in *Kearnes* v. *Montgomery*, 1866, 4 West. Va. 29; Brandt *On Suretyship, etc.*, s. 1.

[12] Codes Civil France and Belgium, 2021; Germany, 770; Spain, 1822, 1840; Portugal, 818, 830; Italy, 1907; Holland, 1868; Lower Canada, 1931, 1941.

[13] *Mallet* v. *Bateman*, 1865, L.R. 1 C.P. 163; De Colyar's *Law of Guarantees, etc.*, 3rd edition, p. 207.

informed of such default having taken place, as it is his (the surety's) duty to see that the principal's obligation is fulfilled.[1]

In *England* it was formerly considered that a creditor was entitled to the benefit of all securities which the principal debtor had given to his surety, as well as to those which he (the creditor) had received from the principal debtor.[2] This proposition can, however, no longer be maintained,[3] though in a case recently decided in *Ireland* it was held that, on a surety's death, insolvent, and his estate being released from liability under his guarantee, the creditor was entitled to an assignment of a counter security, received by the surety from his principal.[4] In *America*, however, the creditor is, as a general rule, at all events, entitled to the benefit of securities given by the principal to the surety for the latter's indemnity, upon the ground, *semble*, that as such securities form a trust created for the better securing of the debt guaranteed, it attaches thereto, and may therefore be made available by the creditor, although unknown to him.[5] But even in America the creditor cannot avail himself of a personal indemnity given to the surety unless the latter could have done so,[6] nor can the creditor be subrogated to the personal indemnity of a surety after the principal debt has been extinguished.[7]

The rights of the creditor are in *England* available against the heirs and personal representatives of the surety, whether named or not,[8] and the same is the case in America;[9] while some of the existing Codes Civil expressly provide that the surety's undertaking shall bind his heirs.[10] By the Roman Law, though *fidejussores* could bind their heirs,[11] *sponsores* and *fidepromissores* could not do so.[12]

As regards the extent of the surety's liability in *England*[13] and *America*[14]

[1] *Wright* v. *Simpson*, 1802, 6 Ves., at p. 733.

[2] Burge *On Suretyship*, p. 324, and cases there cited.

[3] See *In re* Walker, *Sheffield Banking Co.* v. *Clayton*, 1892, 1 Ch. 621; De Colyar's *Law of Guarantees, etc.*, 3rd edition, p. 362.

[4] *M'Mahon* v. *Featherstonhaugh*, 1895, 1 Irish R.Ch.D. 182.

[5] Brandt *On Suretyship, etc.*, ss. 282 *et seq.*

[6] *Ibid.*, s. 284.

[7] *Ibid.*, *Wilson* v. *Rose's Executors*, 51 Ala. 292.

[8] Heirs were, at Common Law, only liable if named, and then only in respect of deeds. Now, however, 3 & 4 Will. IV., c. 104, makes the real estate of a deceased person chargeable with all liabilities which may arise out of obligations entered into by him during his life (see Williams, *Law of Executors*, 9th edition, vol. ii., p. 1596) Moreover, they are bound *by deeds*, though *not* named (Conv. Act, 1881, s. 59), as are also personal representatives (*ibid.*). Personal representatives of a surety are bound by a guarantee, though not named therein (*Bradbury* v. *Morgan*, 1862, 1 H. & C. 249, 255; and see *Hyde* v. *Skinner*, 1723, 2 P. Wms. 197).

[9] *Lansdale* v. *Cox*, 1828, 21 Kentucky Reports, p. 404.

[10] Codes Civil France and Belgium, 2017; Lower Canada, 1937.

[11] Gai. iii. 118, 119.

[12] Gai. iii. 120.

[13] *Wright* v. *Russell*, 1774, 2 W. Bl. 934; *Tanner* v. *Woolmer*, 1853, 8 Exch. 482; De Colyar's *Law of Guarantees, etc.*, 3rd edition, p. 201; *Arlington* v. *Merricke*, 1667, 2 Saund 402; *Pearsall* v. *Summersett*, 1812, 4 Taunt 593.

[14] See *Ludlow* v. *Simond*, 1805, 2 Caines' Cases in Error 1; Brandt *On Suretyship, etc.*, ss. 79 *et seq.*

it certainly depends on the precise terms of his obligation, beyond which he cannot be made responsible. On this subject it is interesting to note that the Indian Contract Act, 1872, expressly provides that the liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by contract.[1] The *French* and *Belgian* Codes Civil enact that suretyship is not presumed, but must be expressed, and cannot be extended beyond the limits within which it is contracted,[2] and that indefinite suretyship extends to all the accessories of the principal obligation, even to the costs of the principal action and to all costs subsequent to notice of such action given to the surety.[3] The Codes of *Spain*[4] and *Lower Canada*[5] contain similar provisions, while that of *Egypt* (mixed suits) enacts that, in default of express agreement, the contract of suretyship extends only to the principal of the debt, and does not involve joint and several liability.[6] The *German* Code, it may be mentioned, makes the extent of the surety's liability depend on the ultimate condition of the principal obligation.[7]

Subject to certain *exceptions*, as they are called, of which the surety may avail himself, to be mentioned presently, where there are more sureties than one, each is liable *in solido* to the creditor by the existing Codes Civil,[8] and also in *England*[9] and *America*,[10] save where a different liability is expressly stipulated for.[11] The Roman Law on this subject was practically identical with that now prevailing.[12]

The creditor may in *England*[13] and *America*[14] sue the surety before suing the principal debtor, in the absence of express stipulation to the

[1] S. 128.

[2] Art. 2015; and see also Code of Lower Canada, Art. 1935.

[3] Art. 2016.

[4] Art. 1827.

[5] Art. 1936.

[6] Art. 608; and see Egyptian Code (native tribunals), Arts. 498-9.

[7] Art. 767.

[8] Codes Civil France and Belgium, 2021, 2025; Portugal, 840; Spain, 2030; Italy, 1917; Holland, 1881; Germany, 769; Lower Canada, 1945. The Egyptian Code (mixed suits) provides that where there are several sureties bound for the same debt and by the same document, without any stipulation as to joint and several liability, the creditor has a right of action against the sureties only for their respective shares (Art. 615), but that there is no such presumption raised where the sureties have undertaken by several successive documents, though the circumstances of the case may nevertheless give rise to it (Art. 616). And see Egyptian Code (native tribunals), Art. 504.

[9] *Cowell* v. *Edwards*, 1797, 2 B. & P. 268; *Deering* v. *Winchelsea*, 1800, 2 B. & P. 270; T. C. 2 W. & T. L.C. in Equity, 7th edition, 535. Also in Scotland (Bell's *Principles of the Laws of Scotland*, p. 113).

[10] *Lansdale* v. *Cox*, 1828, 7 T.B. Mon. (Ky.) 401, 404, *per* Bibb C.J.

[11] See *Craythorne* v. *Swinburne*, 1807, 14 Ves. 160; *Collins* v. *Prosser*, 1823, 1 B. & C. 682, 687, 688.

[12] Gai. iii. 121; Dig. 46, 1, 26, 28.

[13] *Ranelagh* v. *Hayes*, 1683, 1 Vern. 189; *Wright* v. *Simpson*, 1802, 6 Ves. Jun. 714, 733.

[14] Brandt *On Suretyship, etc.*, s. 82.

contrary.[1] By various Codes Civil the creditor's right to sue the surety, in the first instance, is subject to the latter's right to insist on the goods, etc. (if any), of the principal debtor being first *discussed*, *i.e.* appraised and sold and appropriated to the liquidation of the debt guaranteed.[2]

The *Portuguese*[3] and *Spanish*[4] Codes expressly enable the creditor to sue simultaneously the surety and the principal debtor, while preserving the surety's right to have recourse to the latter. The former Code, moreover, provides that, should the surety be sued alone, he may insist on the principal debtor being joined as co-defendant,[5] and, upon judgment being obtained against both of them, permits the surety to require the goods of the principal debtor, if available for the purpose, to be taken in execution.[6]

Privileges and Rights of Sureties.—In nearly every country but our own[7] and America,[8] a surety can, on being applied to by the creditor to fulfil the guarantee, avail himself of the benefit of discussion just referred to. This benefit can, however, be, and frequently is, expressly renounced by the surety in his contract.[9] In some countries the surety must, if he wishes to avail himself of the privilege, expressly claim it when first sued,[10] and at the same time indicate to the creditor what goods and effects of the principal debtor are available for discussion, and likewise advance sufficient funds for making the same.[11] A judicial surety and a surety for him are by certain codes excluded from this particular benefit.[12] The Portuguese and Spanish Codes in express terms allow a surety for a surety to claim the benefit of discussion,[13] while other Codes are silent on this subject. The Spanish Code, moreover, provides that the benefit of discussion shall remain intact, even after both the surety and the principal debtor have been condemned at the instance of the creditor;[14] and by the existing German Code the circumstances under which this benefit may be extinguished are carefully enumerated.[15] In Scotland, where formerly the right of discussion existed, the creditor can now, as in England, proceed at once against the defaulting principal *or* his surety. This change was

[1] See *Holl* v. *Hadley*, 1835, 2 A. & E. 758.

[2] Codes Civil France and Belgium, 2021 *et seq.*; Germany, 771-2; Portugal, 830; Spain, 1831; Italy, 1907; Holland, 1868; Lower Canada, 1941-2; Egypt (mixed suits), 612; *ibid.* (native tribunals), 502.

[3] Art. 831. [4] Art. 1834. [5] Art. 832. [6] Art. 833.

[7] Even in England, however, by express agreement of the parties, the creditor may be, and sometimes is, bound to exhaust his remedies against the principal before suing the surety (*Holl* v. *Hadley*, 1835, 2 A. & E. 758).

[8] Brandt *On Suretyship, etc.*, s. 82; and see *Salt Springs National Bank* v. *Glover*, 1890, 64 New York S.C.R. 265.

[9] See Van Der Linden's *Institutes of Holland*, p. 121.

[10] Codes Civil France and Belgium, 2022-3; Spain, 1832; Lower Canada, 1942.

[11] *Ibid.*

[12] Codes Civil France and Belgium, 2042-3; Spain, 1856; Lower Canada, 1964-5.

[13] Portugal, 837; Spain, 1836. [14] Arts. 1834, 1836. [15] Art. 773.

effected by the Mercantile Law Amendment Act (Scotland), 1856,[1] which first brought the Scottish Law into conformity with the English Law of Suretyship, and abolished the benefit of discussion in all cases where it is not expressly claimed.[2]

Another benefit or privilege to which the surety is in some countries,[3] though not in England or America, entitled, but which he may likewise waive, is that of division (*beneficium divisionis*), as it is called. This arises where there are several sureties for the same debt and one of them is sued by the creditor for the whole. Under such circumstances the creditor may be compelled by the surety sued to divide his (the creditor's) claim amongst all the solvent sureties, and reduce it to the share and proportion of each surety.[4] Once a creditor has spontaneously recognised the benefit of division and divided his action, he is by some Codes bound by such election, and cannot afterwards recede from the division he has adopted, notwithstanding the subsequent insolvency of some of the sureties.[5] In certain countries the benefit of division is not available where there has been no previous discussion of the principal debtor.[6] By the Law of *Scotland* all the co-cautioners are bound by the same writing, so that there is no place for this particular benefit.[7] For when they become obliged, conjointly and severally, the plain intention of the parties is that the obligation should not be divided; and where they are bound simply as cautioners, each co-cautioner is, by the genuine nature of such obligation, without any privilege, liable only for his own proportion, while the other obligants are solvent, except where the obligation is in itself indivisible.[8]

A *third* privilege enjoyed by sureties, under many existing Codes Civil, is that of setting up against the creditor, when sued by him, all the exceptions (*i.e.* pleas in defence) which belong to the principal debtor and which are inherent to the debt and are not merely *personal* to him.[9] The *English*

[1] 19 & 20 Vict., c. 60, s. 8; and see *Newall* v. *Harkness*, 1870, 9 M. 35.

[2] Erskine's *Principles of the Laws of Scotland*, 20th edition, p. 385; Bell's *Principles of the Laws of Scotland*, 10th edition, p. 111.

[3] Codes Civil France and Belgium, 2025-7; Portugal, 835-6; Spain, 1837; Italy, 1911-2; Holland, 1873-4; Germany, 426; Lower Canada, 1946; as to Egypt, see Arts. 615 and 616 of Codes (mixed suits) quoted in note 8 on p. 57.

[4] See references in last preceding note

[5] Codes Civil France and Belgium, 2027; Portugal, 836; Lower Canada, 1947.

[6] Codes Civil Portugal, 835; Spain, 1837.

[7] Erskine's *Principles of the Laws of Scotland*, 20th edition, p. 386; but see *contra* Bell's *Principles of the Laws of Scotland*, 10th edition, p. 113; 3 Ersk., s. 63.

[8] Erskine's *Principles*, p. 386. The *Egyptian* Code (mixed suits), it is to be noticed, provides that where the sureties are bound for the same debt and by the same document, without any stipulation as to joint and several liability, the creditor has a right of action against the sureties only for their respective shares (Art. 615). *Aliter*, where the sureties have undertaken by several successive documents (Art. 616); and see Egyptian Code (native tribunals), Art. 504.

[9] Codes Civil France and Belgium, 2036; Portugal, 854; Spain, 1853; Italy, 1927; Holland, 1884; Germany, 768.

Law, too, enables the surety in any Court to avail himself against the creditor of the equitable defence of set-off existing between the latter and the principal debtor.[1] *Semble* (at least according to the weight of authority), this can also be done in *America*.[2]

Yet another benefit reserved to sureties by many Codes is that of being subrogated, on payment of the debt guaranteed, to all the rights of the creditor against the principal debtor.[3] This right is fully recognised in *England*[4] and also in *America*,[5] and is not dependent on contract, but is the result of the equity of indemnification attendant on the suretyship.[6] On this subject it is expressly provided by the Indian Contract Act, 1872, that the surety, on payment or performance of all that he is liable for, is invested with all the rights which the creditor had against the principal debtor.[7]

The benefits already referred to had their counterparts in Roman Law,[8] and are evidently derived therefrom, as are also, in some cases, their very names.[9] The Roman Law did not, however, recognise the right of contribution amongst sureties as it exists at the present day in England[10] and elsewhere.[11] This right, it may be mentioned, is not founded in contract, but is, like the right of subrogation, the result of general equity.[12] According

[1] *Bechervaise* v. *Lewis*, 1872, L.R. 7 C.P. 372; De Colyar's *Law of Guarantees, etc.*, 3rd edition, pp. 458 *et seq.*; and see Jud. Act, 1873, s. 24, sub-ss. (3) and (4).

[2] Brandt *On Suretyship, etc.*, s. 203, and cases there cited.

[3] Codes Civil France and Belgium, 2029; Portugal, 839; Spain, 1839; Italy, 1916; Holland, 1877; Germany, 774; Lower Canada, 1950; Egypt (mixed suits), 617; *ibid.* (native tribunals), 505.

[4] *Ex parte* Crisp, 1743, 1 Atk. 133; *Mayhew* v. *Crickett*, 1818, 2 Swanst 185, 191; *Craythorne* v. *Swinburne*, 1807, 14 Ves. 160; *Duncan Fox & Co.* v. *North & South Wales Bank*, 1880, 6 App. Cas. 1. The right of subrogation is also recognised by following Colonial Statutes, *viz.* South Australian Mercantile Law Amendment Act, 1861 (24 & 25 Vict., No. 3), s. 3; Tasmanian Mercantile Law Amendment Act, 1858 (22 Vict., No. 3), s. 1; New Zealand Mercantile Law Amendment Act, 1880 (44 Vict., No. 12), ss. 81-2; and see Morice's *English and Roman Dutch Law*, p. 98.

[5] *Tobin* v. *Kirk*, 1893, 80 New York S.C.R. 229.

[6] See *Duncan Fox & Co.* v. *North & South Wales Bank, supra.*

[7] S. 140.

[8] See Hunter's *Roman Law*, 4th edition, pp. 568, 578.

[9] *Beneficium Ordinis vel Discussionis* (Nov. 4, 1); *Beneficium Divisionis* (Gai. iii. 121; Dig. 46, 1, 20); *Beneficium Cedendarum Actionum* (Dig. 46, 1, 17). As to exceptions (*exceptiones*) available to sureties, see Gai. iv. 115-6.

[10] See De Colyar's *Law of Guarantees, etc.*, 3rd edition, p. 339; Holland's *Jurisprudence* 6th edition, p. 269. It is not always easy to determine whether a person is a surety liable to contribution and entitled thereto or a surety for a surety, who occupies a totally different position—see *In re Denton's Estate* (1904), 2 Ch. 178 C.A.

[11] Codes Civil France and Belgium, 2033; Spain, 1844; Portugal, 845; Italy, 1920; Holland, 1881; Lower Canada, 1955; Germany, 426 and 774; Egypt (mixed suits), 618; *ibid.* (native tribunals), 506; Indian Contract Act, 1872, ss. 146-7. In *America*, see *Lansdale* v. *Cox*, 1828, 7 T.B. Mon. (Ky.) 401.

[12] *Per* Lord Eldon L.C. in *Underhill* v. *Horwood*, 1804, 10 Ves. 208.

to some authorities, it dates from the very earliest times,[1] and can at all events be traced back in our own country to the days of Elizabeth.[2]

The right of a surety to be fully indemnified by the principal debtor against loss arising to the former out of the guarantee seems to be universally admitted by modern Codes.[3] In *England*[4] and *America*[5] this right arises only when the suretyship was undertaken at the request, express or implied, of the principal, while in some other countries, following the Roman Law in this respect,[6] such a request is not regarded as a condition precedent to the surety's right of indemnification.[7] The English Law, however, enables a person who has become a surety at the request of the principal to recover from him indemnification, even when he (the surety) has paid the debt guaranteed without his (the principal's) consent, and without even giving notice to him.[8] This seems to be the case in *America* also.[9] In some countries, where the surety has spontaneously paid the creditor, the principal debtor may avail himself of certain exceptions against the surety which he (the principal) would have had against the creditor,[10] while, where the surety pays *before* the expiration of the period of credit, he cannot, according to some codes, recover from the principal debtor till such credit has actually expired.[11] Moreover, in certain countries a surety who has paid the creditor, without giving previous notice to the principal, cannot have recourse to the latter, when he (the principal) has, in ignorance of the surety's having already done so, himself paid the creditor over again, or has grounds for having the claim declared void or extinguished.[12]

[1] See *Lawson* v. *Wright*, 1786, 1 Cox C. in Equity 275-6.

[2] *Per* Wright J. in *Wolmershausen* v. *Gullick*, 1893, 2 Ch., at p. 520.

[3] Codes Civil France and Belgium, 2028; Portugal, 838; Spain, 1838; Italy, 1915; Holland, 1876; Germany, 775; Lower Canada, 1948; Egypt (mixed suits), 613; and see Van Der Linden's *Institutes of Holland*, p. 122.

[4] *Alexander* v. *Vane*, 1836, 1 M. & W. 511; *Hodgson* v. *Shaw*, 1834, 1 M. & K. 183, 190; *Exall* v. *Partridge*, 1799, 8 T.R. 308; and see Indian Contract Act, 1872, s. 145; Bell's *Principles of the Laws of Scotland*, 10th edition, p. 112.

[5] Brandt *On Suretyship, etc.*, s. 180, and cases there cited.

[6] Pothier's *Law of Obligations*, Evans's edition, vol. i., pp. 229, 277; Hunter's *Roman Law*, 4th edition, p. 570. When the suretyship was contracted without the principal's knowledge or consent the surety could not proceed by *actio mandati*, but was limited to the *actio contrarii negotiorum gestorum* (Pothier, *supra*, pp. 229, 277).

[7] Codes Civil France and Belgium, 2028; Portugal, 831; Spain, 1838; Italy, 1915; Holland, 1876. By the Code Civil of Lower Canada, however, a surety who has bound himself without the consent of the principal debtor has, with certain reservations, no remedy for what he has paid beyond what the debtor would have been obliged to pay if the suretyship had not been entered into (Art. 1949).

[8] *Exall* v. *Partridge*, 1799, 8 T.R. 308; *Warrington* v. *Furbor*, 1807, 8 East 242.

[9] *Rice* v. *Southgate*, 1860, 16 Gray 142.

[10] Codes Civil France and Belgium, 2031; Portugal, 841; Spain, 1840; Italy, 1918; Lower Canada, 1952.

[11] Portugal, 843; Spain, 1841.

[12] Codes Civil France and Belgium, 2031; Portugal, 842; Spain, 1842; Italy, 1918; Lower Canada, 1952; Egypt (mixed suits), 619 (native tribunals), Art. 507.

In most countries (including *England*[1] and *America*[2]) a surety can, even *before* payment, claim to be discharged from his obligation by the principal debtor. This right, in many countries, can be exercised only under specially prescribed circumstances,[3] and in *England* seems to be limited to cases where the creditor has a right to sue the principal debtor and has refused to exercise such right.[4] On this subject Lindley L.J. says, "In equity a contract to indemnify can be specifically enforced before there has been any such breach of contract as would sustain an action at law. In equity the plaintiff need not pay and perhaps ruin himself before seeking relief. He is entitled to be relieved from liability."[5] Some codes provide that the surety can, instead of being discharged before payment from liability, obtain from the principal debtor a covering guarantee.[6]

As regards *the extent* of the indemnification to which a surety is entitled, the existing Codes Civil usually enable him to recover from the principal debtor principal, interest, and costs (if such costs were incurred subsequently to notice given by the surety to the principal of proceedings having been taken against the surety), together with damages (if any).[7] In *England* the surety is always entitled to recover from the principal debtor what he (the surety) has actually paid, with interest,[8] and also the reasonably incurred costs of defending actions where at least the principal debtor has authorised their being defended,[9] and possibly even in other cases.[10] Moreover, if the surety can establish that he has suffered damage beyond the principal and interest which he has been compelled to pay, he will, *semble*, be entitled to recover that damage from the principal debtor.[11] The *American* Law also appears to entitle the surety to recover full

[1] This right has been sometimes disputed (*Lloyd* v. *Dimmack*, 1877, 7 Ch.D. 398; *Hughes Hallett* v. *Indian Mammoth Gold Mines Co.*, 1882, 22 Ch.D. 561; *Mathews* v. *Saurin*, 1893, 31 L.R. Ir. 181), but seems nevertheless to be firmly established (*Ranelagh* v. *Hayes*, 1683, 1 Vern. 189-90; *Ex parte Snowdon re Snowdon*, 1881, 17 Ch.D. 44, 47; *per* Sir W. Grant, M.R., in *Antrobus* v. *Davidson*, 1817, 3 Meriv. 569; *per* Willes J. in *Bechervaise* v. *Lewis*, 1872, L.R. 7 C.P. 372, 377; *Wolmershausen* v. *Gullick*, 1893, 2 Ch. 514.

[2] Brandt *On Suretyship, etc.*, s. 192, and cases there cited.

[3] Codes Civil France and Belgium, 2032; Portugal, 844; Spain, 1843; Italy, 1919; Holland, 1880; Germany, 775; Lower Canada, 1953; Egypt (mixed suits), 614.

[4] *Ranelagh* v. *Hayes*, 1683, 1 Vern. 189-90; *Padwick* v. *Stanley*, 1852, 9 Hare 627.

[5] In *Johnson* v. *Salvage Association*, 1887, 19 Q.B.D., at pp. 460-1; and see *Robinson* v. *Hirkir*, 1896, 2 Ch. 415, 426; *Ellis* v. *Pond*, 1898, 1 Q.B. 426, 454.

[6] Codes Civil, Spain, 1843; Germany, 775.

[7] See Codes Civil France and Belgium, 2028; Portugal, 838; Spain, 1838; Italy, 1915; Holland, 1876; Lower Canada, 1948.

[8] *Petre* v. *Duncombe*, 1850, 20 L.J. N.S. Q.B. 242; *Reed* v. *Norris*, 1837, 2 Mylne & C. 361.

[9] *Gillett* v. *Rippon*, 1829, Mood & M. 406.

[10] See De Colyar's *Law of Guarantees, etc.*, 3rd edition, p. 310, and cases there cited.

[11] *Per* Stirling J. in *Badeley* v. *Consolidated Bank*, 1886, 34 Ch. Div. 556.

indemnity from the principal,[1] though his claim to costs incurred by him seems to depend upon the circumstances of each case.[2]

The *Roman* Law, it may be mentioned, gave to a certain class of sureties, namely *sponsores*, a right of action against the principal debtor, termed *actio depensi*, whereby double the amount of what they had paid in respect of the guaranteed debt, was recoverable, where the principal debtor denied his liability.[3]

Extinguishment and Discharge of Contract of Suretyship.—This subject, being extensive, does not admit of detailed treatment, owing to the limits of space. The obligation of a surety is extinguished in many ways common to all obligations.[4] These need not be referred to. As already mentioned, as a general rule, whatever extinguishes the principal obligation necessarily includes that of the accessory, and involves the liberation of the sureties from liability,[5] except, so far at least as England is concerned, where, in certain cases the discharge takes place by operation of law,[6] though, *semble*, even in *England* the surety is, usually, released if there be any material alteration of his position, accomplished without his consent, although effected by operation of law.[7] This rule accords with the *Roman* Law on the subject, whereby, if the principal obligation were extinguished, by its appropriate divestitive fact, the surety was at once released.[8] So various Civil Codes provide that where the creditor voluntarily accepts from the principal debtor something in payment of the debt guaranteed, the surety is discharged, though such creditor should afterwards be evicted, *i.e.*, forcibly deprived of it.[9] In this connection it may be mentioned that most of the existing Codes Civil provide that where the surety becomes heir of the principal debtor (or *vice versa*), thus producing a confusion or merger of two district characters in one person, the creditor retains his right of action against a surety for the surety (if there be one).[10] By the Roman Law a contract could certainly be dissolved by means of *confusio*; for where it took effect in the person

[1] Brandt *On Suretyship, etc.*, ss. 176 *et seq.*

[2] *Ibid.*, s. 187.

[3] Lex Publia (B.C. 383); Gai. iii. 127.

[4] Pothier's *Law of Obligations*, Evans's edition, vol. i., p. 260; Codes Civil France and Belgium, 2034; Spain, 1847; Lower Canada, 1956; Portugal, 848.

[5] Burge *On Suretyship*, pp. 160 *et seq.*; Brandt *On Suretyship, etc.*, ss. 121-4; and see Codes Civil France and Belgium, 2034, 2038; Portugal, 848; Spain, 1847; Lower Canada, 1956, 1960; Egypt (mixed suits), 622; *ibid.* (native tribunals), 509; Indian Contract Act, 1872, s. 134.

[6] See *In re London Chartered Bank of Australia*, 1893, 3 Ch. 540; *Dane* v. *Mortgage Insurance Corporation*, 1894, 1 Q.B. 54 C.A.

[7] *Per* Wright J. in *Mortage Insurance Company* v. *Pound*, 1894, 64 L.J. Q.B., at p. 396.

[8] Dig. 46, 1, 60; *Ibid.* 46, 1, 68; Hunter's *Roman Law*, 4th edition, p. 575.

[9] Codes Civil France and Belgium, 2038; Portugal, 850; Spain, 1849; Lower Canada, 1960; Egypt (mixed suits), 624; *ibid.* (native tribunals), 511.

[10] Codes Civil France and Belgium, 2035; Portugal, 849; Spain, 1848; Italy, 1926; Holland, 1883; Lower Canada, 1957.

of the principal debtor, it liberated the surety, though where it occurred in the person of the surety, it did not cause the extinction of the principal obligation.[1] Often the discharge of a surety is accomplished by conduct of the creditor inconsistent with the rights of the surety.[2] Thus, in most countries, if by act or omission of the creditor the surety cannot, on payment of the debt guaranteed, be subrogated to his rights, the surety is discharged.[3] On this subject the Indian Contract Act, 1872, provides that if the creditor loses, or without the consent of the surety parts with, securities to the benefit of which the surety is entitled, he (the surety) is thereby discharged.[4] The discharge by the creditor of one co-surety without the consent of the rest operates, in some countries at all events, as a release *pro tanto*. This is the case in *Spain*[5] and *Portugal*,[6] and also, *semble*, in *America*[7] and *Scotland*,[8] while in *England*, so far as the decisions have yet gone on the subject, they tend to support the view that the effect of the discharge of one of several sureties by the creditor on the liability of the rest varies according to the circumstances of each case.[9] On the other hand, the Indian Contract Act, 1872, expressly provides that where there are co-sureties, a release by the creditor of one of them does not discharge the others, neither does it free the surety so released from his responsibility to the other sureties.[10] The discharge of fidelity bonds and other continuing guarantees given to firms or unincorporated companies by changes subsequently taking place in the constitution of such firms or companies (though sanctioned in *England*[11] and *America*[12] by the Common Law and also by Statute) is certainly not expressly provided for by any of the existing Codes Civil, some of which, however, as already stated, do enact that a surety

[1] Dig. 46, 3; Lord Mackenzie's *Roman Law*, 6th edition, p. 271. In Van Der Linden's *Institutes of Holland* it is stated that the guarantee is extinguished when the two characters of principal debtor and surety become united in one and the same person, *e.g.* where one becomes heir to the other (pp. 118-9).

[2] De Colyar's *Law of Guarantees, etc.*, 3rd edition, pp. 394 *et seq.*; and see Indian Contract Act, 1872, s. 139.

[3] *Wulff* v. *Jay*, 1872, L.R. 7 Q.B. 756; *Pledge* v. *Buss*, 1860, Johns 633; *Capel* v. *Butler*, 1825, 2 S. & S. 457; *per* Turner L.J. in *Wheatley* v. *Bastow*, 1855, 7 De G. M. & G. 261, 279-80; Brandt *On Suretyship, etc.*, ss. 261, 384 *et seq.*; *per* Kent C.J. in *Ludlow* v. *Simons*, 1805, 2 Caine's Cas. in Error, at p. 58; and see Codes Civil France and Belgium, 2037; Portugal, 853; Spain, 1852; Italy, 1928; Germany, 776; Egypt (mixed suits), 623.

[4] S. 141. [5] Art. 1850. [6] Art. 851.

[7] Brandt *On Suretyship, etc.*, s. 383.

[8] Mercantile Law Amendment Act (Scotland), 1856 (19 & 20 Vict., c. 60), s. 9; Erskine's *Principles of the Laws of Scotland*, 20th edition, p. 390.

[9] De Colyar's *Law of Guarantees, etc.*, 3rd edition, pp. 420 *et seq.*; and see *Mercantile Bank of Sydney* v. *Taylor*, 1893, A.C. 317.

[10] S. 138; and see s. 44.

[11] Partnership Act, 1880, s. 18, which is declaratory of the Common Law; and see De Colyar's *Law of Guarantees, etc.*, 3rd edition, p. 277 *et seq.* In *Scotland*, by 19 & 20 Vict., c. 60, s. 7.

[12] Brandt *On Suretyship, etc.*, s. 99.

shall not be bound beyond the extent of his engagement.[1] In *England*[2] and *America*[3] a surety is discharged from liability where the creditor, without the surety's consent, binds himself, by contract with the principal debtor, to extend the time for fulfilling the principal obligation, unless there be a reserve of remedies against the surety.

The same rule prevails in *India*,[4] while in *Scotland*, though the giving of time does generally discharge the surety,[5] this ground of defence to an action brought against the surety is not in that country usually competent in cases of cash credit or continuing guarantees.[6] This method of discharge has not been universally adopted by existing Codes Civil. On the contrary, while it is recognised by two Codes only,[7] it is rejected by the remainder of them.[8] The German Code, on the other hand, does not contain any express provision on this subject, while, however, providing by Art. 777 that where a surety has guaranteed an existing obligation for a certain fixed period of time, he is released on the expiration thereof unless the creditor takes certain steps thereby indicated for the recovery of the debt, proceeds to do this *without delay*, and, when such proceedings have terminated, informs the surety that he intends to have recourse to him.

None of the existing Codes Civil seem to provide in express terms for the revocation of the contract of suretyship by notice, though this method of discharge is permitted in *England* and *America*, under certain circumstances, more or less dependent on the nature of the guarantee itself.[9] Nor is the death of the surety mentioned as a ground of discharge by any of the existing Codes, some of which, however, make the contract of suretyship binding on the heirs,[10] which, however, may only mean that they shall be responsible for liability accrued at the date of the surety's death. In our own country,[11] and also, it is believed, in *America*,[12] whether the death of a surety operates as a revocation depends on the nature of the guarantee itself. On this subject the Indian Contract Act, 1872, provides that the death of

[1] Codes Civil France and Belgium, 2015; Spain, 1827; Lower Canada, 1935.

[2] *Rouse* v. *Bradford Banking Co., Limited*, 1894, A.C. 586; De Colyar's *Law of Guarantees, etc.*, 3rd edition, p. 422, and cases there cited.

[3] *Per* Gaines C.J. in *Benson* v. *Phipps*, 1895, 47 Texas 128.

[4] S. 135, and see s. 136.

[5] Erskine's *Principles of the Laws of Scotland*, 20th edition, p. 390.

[6] See *Stewart Moir & Muir* v. *Brown*, 1871, 9 Scotch Sess. Cas., 3rd series, 763.

[7] Portugal, 852; Spain, 1851.

[8] Codes Civil France and Belgium, 2039; Italy, 1930; Holland, 1887; Lower Canada, 1961; Egypt (mixed suits), 613; *ibid.* (native tribunals), 503; and see Morice's *English and Roman Dutch Law*, p. 96; Van Der Linden's *Institutes of Holland*, pp. 120-21.

[9] See De Colyar's *Law of Guarantees, etc.*, 3rd edition, p. 388; Brandt *On Suretyship, etc.*, s. 160.

[10] Codes Civil France and Belgium, 2017; Lower Canada, 1937.

[11] De Colyar's *Law of Guarantees, etc.*, 3rd edition, pp. 392 *et seq.*; *Lloyd's* v. *Harper*, 1880, 16 Ch.D. 290.

[12] Brandt *On Suretyship, etc.*, s. 113-4.

THE GREAT JURISTS OF THE WORLD.[1]

IV.—HUGO GROTIUS.[2]

[*Contributed by the late* SIR WILLIAM RATTIGAN, K.C.]

IT was in the declining years of the second epoch into which the history of Jurisprudence is usually divided—namely, from the Fall of the Western Empire in the year 476 A.D. to the Peace of Westphalia in the year 1648 A.D.—that the great Dutch jurist whose name stands at the head of this paper lived and flourished. It was an epoch which embraced the Middle Ages and reached the threshold of modern times—a period marked by much stress and storm, but gradually chastened towards its close by a new spirit of humanitarianism, which, however dimly at first, began to create fresh ideals and to establish new principles of statecraft. And among the jurists whose names are associated with this new movement there is none in whom it finds a more precise and abiding expression than the scholar, the philosopher, the statesman, the poet, the historian, and the eminent jurist whose surname, first given to his grandfather, was Groot, or Greut, afterwards latinised into Grotius. Judged from every standpoint of human greatness, no surname could have been more appropriate or

[1] This was the last production of its learned author. In the series of "The Great Jurists of the World" he took much interest, and had promised other studies of some of them, which the readers of the Journal would have prized. Upon the completion of his account of Grotius, he started on the journey in which he met with a fatal accident; thus closing, to the enduring regret of many friends and to the great loss of jurisprudence, a singularly varied and useful career.

[2] The following are the principal authorities consulted: Jean Barbeyrac's French translation of the *De Jure Belli et Pacis* (Amsterdam, 1724); M. P. Pradier-Fodéré's French translation of same (3 vols, Paris, 1867); Whewell's edition of same work (3 vols, Cambridge University Press); same work done into English by several hands, with Life of author (London, 1715); *Life of Grotius*, by Charles Butler (London, 1826); *Hugo Grotius*, by L. Neumann (Berlin, 1884); *Opinions of Grotius*, by D. P. de Bruyn (London, 1894); Hallam's *Introduction to the Literature of Europe* (4 vols, 1864); *Geschichte der Rechtsphilosophie*, by Friedrich Julius Stahl (Heidelberg, 1847); Calvo, *Le Droit International* (vol. i. Paris, 1887); Ahren's *Naturrecht oder Philosophie des Rechtes* (Wien, 1870); *Elements du Droit International*, par Henry Wheaton (Leipzig, 1858); *Encyclopædia Britannica*, tit. Grotius.

more worthily borne; and his portrait, painted by his contemporary Rubens, now in the Dresden Gallery, shows him to have been a man of noble bearing, handsome features, and benevolent expression, while all accounts agree in bearing testimony to his piety, probity, and profound learning. Dr. Johnson, referring to him in a letter he wrote to Dr. Vyse on behalf of a nephew of Grotius, speaks of him as one "of whom every learned man has perhaps learned something."

Family Origin.—Born at Delft on Easter Sunday, April 10th, 1583, four years after the seven northern provinces had constituted themselves into a separate political union known as the Utrecht Union, Hugo Grotius was descended on the paternal side from an aristocratic French family named Carnet. His great-grandfather was Cornelius Carnet, who married Ermingarde, the daughter and sole heiress of Diederic de Groot, Burgomaster of Delft, who stipulated that the issue of the marriage should assume his own surname, which had been conferred upon one of his ancestors for eminent services to the State. It was in accordance with this stipulation that the son Hugo took the name of Groot, which thereafter became the family surname, and descended through John (or Jan), his father, to the subject of the present article. Learning appears to have been hereditary in the family, and John himself was a Doctor of Laws and Rector of the Leyden High School, and was distinguished as an eminent scholar and a lawyer of considerable repute. But Hugo, his son, soon eclipsed all the other members of the family by the extraordinary precocity of his intellect.

Early Precocity.—At the early age of nine he was an accomplished versifier of Latin elegiacs, and at twelve he had entered the University of Leyden, where he became the pupil of the celebrated scholar Joseph Scaliger, having already had his praises sung by Douza, who was said to be one of the princes of the republic of letters, and who announced that "Grotius would soon excel all his contemporaries and bear a comparison with the most learned of the ancients." Two years later the youthful prodigy produced an annotated edition of the abstruse work of Martianus Mineus Felix Capella on *The Marriage of Mercury and Philology, or of Speech and Learning*, in which he displayed such learning and critical acumen as to astonish the literary world of his day. His own account of the preparation required for the production of this work shows the extent and varied character of his reading. "We have collated," he says, "Capella with the several authors who have investigated the same subjects. In the two first books, we have consulted those whose writings contain the sentiments of the ancient philosophers, as Apuleius, Albericus, and others too tedious to name; on grammar, we have compared Capella with the ancient grammarians; in what he has said on rhetoric, with Cicero and Aquila; on logic, with Porphyry, Aristotle, Cassiodorus, and Apuleius; on geography, with Strabo, Mela, Solinus, and Ptolemy, but chiefly Pliny;

on arithmetic, with Euclid; on astronomy, with Hyginus, and others who have treated on this subject; on music, with Cleonides, Vitruvius, and Boëthius." Nor is this a mere vain or boastful enumeration by a boy of fourteen of the authorities he professed to have consulted, for his notes contain internal evidence of his close acquaintance with these ancient writers. In the same year he published a translation of a work upon navigation by Simon Steven in 1586, in which he displayed a vast knowledge of mathematics; and in the following year he completed the translation of the *Phenomena of Aratus*, a poetical treatise upon astronomy, which Cicero had previously translated, but which had come down to modern times in an incomplete form. In the opinion of a competent critic, the Abbé d'Olivet, the editor of Cicero's works, "the Muse of Cicero did not throw the Muse of Grotius into the shade," and Grotius was complimented on his elegant latinity by some of the greatest scholars of the time. So great was the reputation he had already acquired that in the year 1598 A.D. he was asked by the Dutch Ambassador to France, the illustrious but unfortunate Barneveldt, to accompany him, and on his arrival at the court of Henri IV. he was received by that monarch with many marks of personal favour. It was during this visit that he took the degree of Doctor of Laws at Orleans. On his return to his native country he devoted himself to the practice of the Bar, and conducted his first case before he had reached the age of seventeen. He succeeded at the Bar beyond all expectation, and was appointed Advocate-General of Holland, Zealand, and West Friesland when he was only twenty-four. He was indeed well described as an *adolescentem sine exemplo; juvenem portentosi ingenii*; and he was gifted with an extraordinary memory, of which many striking instances are recorded.

His Marriage.—In July, 1608, Grotius married a lady of Veere, in Zealand, of good family, named Mary Reigersberg, with whom he lived for the rest of his life in perfect harmony. She proved a devoted wife, and is said to have been an ornament to him in prosperity, and his comfort and aid in adversity. By her he had three sons and a daughter who survived him. It is asserted by some that George Grote, the historian of Greece, was connected with the family of Hugo Grotius, though the evidence is wanting to prove this. But the distinguished Netherlands statesman, Count Van Zuzlen van Nierseld, a former Ambassador of his country at Vienna, was certainly descended in direct line from the daughter of the celebrated jurist, who was married to a Frenchman named Mombas. His eldest and youngest son died without being married; but his second son, named Peter de Groot, became Pensionary of Amsterdam, and died at the age of seventy.

His Religious Tendencies.—The son of parents who were both imbued with a deep sense of piety, it was only natural that a youth of such marvellous talents and cosmopolitan sympathies as Grotius should have

imbibed at an early age the religious tendencies of the period, under the guidance of a tutor such as Uitenbogaard, who was destined to play an important *rôle* in the subsequent religious controversies which distracted the Dutch Church. There were about this time two schools of religious thought in the Netherlands, which were violently divided on the dogmas of Free Will and Predestination, represented by two professors of the University of Leyden—namely, Jacob Arminius, Rector of the University, and Franciscus Gomarus, one of the professors. The former taught a modified form of Pelagianism, which sought to modify the extreme harshness of the doctrine of Predestination which had been adopted by Luther, Calvin, and Beza, and of which Gomarus, on the other hand, was an ardent and uncompromising supporter. The latter school being the more orthodox, as its followers were then considered, had the largest number of adherents, and its bitter hatred towards the Arminians subjected the latter to many cruel persecutions, which led to a formal Remonstrance, which was drawn up by the old tutor of Grotius, Uitenbogaard, and submitted to the States-General. Although it is probable that the sympathies of Grotius were all along on the side of the Remonstrants, it was not until the death of Arminius, in 1608, that he really showed his own religious tendencies. He then published a poem entitled *In mortem Arminii*, which at once identified him with the school of which Arminius had been the guiding spirit.

His mission to England as Ambassador to the Court of James I., in 1613, removed him for a time from the sphere of religious controversies, and in the same year he was made Pensionary of Rotterdam, which he only accepted on condition that he should not be deprived of it against his will. That he was able to impose such a condition shows the respect in which he was still held by his countrymen, and it would seem that he abstained at first from openly participating in the religious quarrels which were then becoming more acute. His natural desire was for peace, and he strove to bring about conciliation and a larger spirit of toleration. With this view, he allowed himself to be nominated head of a mission to the city of Amsterdam, and he addressed the assembled burgomasters in a speech in the Dutch language, in which he pleaded eloquently for the necessity and advantage of religious toleration, especially upon points of theoretical doctrine, which, he maintained, would restore tranquillity and peace to the Church. But his eloquence produced no effect, and he was so affected by the bad success of his mission, that he was seized with a fever, which nearly proved fatal to him. By degrees his alienation from the Lutheran Reformed Church became more and more evident, and involved him in the persecution which overtook his old friend Barneveldt. Finally he was arrested on August 29th, 1618, with the latter and another fellow-thinker named Hogerbrets, the Pensionary of Leyden, at the instance of Prince Maurice of Nassau, and brought to trial upon charges of high treason

and of disturbing the established religion of the United Provinces, and also of being the authors of the Insurrection of Utrecht. The arrest was surreptitiously effected, and a special tribunal of twenty-four (some authorities say twenty-six) commissioners was appointed to conduct the trial. The prisoners objected to the constitution of the tribunal, urging that the States of Holland were their only competent judges, and they also pointed out that many of the commissioners were their accusers and notoriously prejudiced against the Arminians. But these objections were all overruled; the prisoners were condemned. The aged Barneveldt, then in his seventy-second year, was sentenced to death, which was duly carried out, and Hogerbrets and Grotius to perpetual imprisonment, the former in his own house, and the latter in the Castle of Louvestein, in South Holland, at the point of the island formed by the Vaal and the Meuse. Grotius reached the castle on June 6th, 1819, and for a time his imprisonment was of a very rigid character; but by degrees this severity was to some extent relaxed, and his wife was allowed to see him twice a week, and he was also permitted to receive books from his friends and to correspond with them except on politics. This indulgence furnished an opportunity for escape, which was quickly seized and carried out by his resolute and devoted wife.

It had become customary for Grotius to receive a chest of books and linen for his use at regular intervals, and although this chest was at first rigorously examined by his guards, their vigilance was gradually relaxed, and the chest was allowed to enter his apartment without suspicion. His wife had observed this laxity, and accordingly devised a plan by which Grotius was to escape in one of these chests. As a preliminary move she represented that Grotius was becoming ill through over-study, and expressed her intention of taking all his books away from him and restoring them to their owners. The next step was to introduce a sufficiently large chest, ostensibly for the purpose of removing the books, but really with the object of secreting her husband inside of it, and thus effecting his escape. Holes were bored into the box to let in air, and when everything was ready, Grotius was placed in the box, while his wife got into his bed, having previously informed his guards that her husband was ill and was not to be disturbed. The device was well carried out, and the box, with Grotius inside, was safely conveyed to Gorcum, where an Arminian friend received it and released Grotius from his peril. The wife remained behind and fearlessly informed the guards, when a sufficient time had elapsed to ensure her husband's safety, that their prisoner had escaped. The governor of the prison at once ordered her into close confinement; but to the honour of the States-General be it added that she was released after a few days, and allowed to take with her everything that belonged to her in the Castle. Thus after twenty months of unjust incarceration, during which he produced the treatise in Dutch verse on the *Truth of the Christian*

Religion, which he afterwards translated into Latin prose, and which was much admired for its terseness, just reasoning, accuracy, and power. Grotius became an exile from his native country, which he did not cease to love with the devotion of the true patriot he was. It cannot be denied, however, that his Protestantism was of a very mild character, and his epistles contain very strong evidence of a decided leaning towards the Roman Catholic Church, which appealed to him (apart from all questions of dogmatic theology, which had little influence with him) on the ground of a venerable and unbroken authority. At the same time many other sects claimed him as an adherent, and this circumstance furnished Menâge with the matter for the following epigram:

> Smyrna, Rhodos, Colophon, Salamis, Chios, Argos, Athenæ,
> Siderei certant vatis de patriâ Homeri;
> Grotiadæ certant de religione, Socinus,
> Arrius, Arminius, Calvinus, Roma, Lutherus.

His Exile and Residence in France.—With his exile Grotius may be said to have entered upon the second stage of his public life, which was destined to be even more distinguished and more fruitful in literary labours than his earlier years, and it was during this period that he produced the monumental work *De Jure Belli et Pacis*, which alone was sufficient to immortalise his name. He found an asylum in France, where he had many admirers, and where he was graciously received by the king (Louis XIII.), who settled a pension of 3,000 livres upon him. But this pension was very irregularly paid, as Cardinal Richelieu, who was then all-powerful, required such absolute and unqualified devotion as a *quid pro quo*, that Grotius was unwilling to barter his independence, and incurred the displeasure of the Cardinal, who made him soon feel that he was master of the situation. Grotius now applied himself to the writing of his *Apology*, which he dedicated to the people of Holland and West Friesland, and in which he ably defended himself against the charges upon which he had been unjustly condemned. This work, which he originally composed in the Dutch language, but afterwards translated into Latin, caused a great sensation in his own country, but it incensed the States-General more than ever against him, and they issued an edict, in which they proscribed it, and forbade all persons to have it in their possession under the penalty of death. This ungenerous edict shattered the lingering hopes he may have entertained of returning to the land of his birth, and made him even anxious for his personal safety. Acting upon the advice of his friends, he applied for and obtained, on February 26th, 1623, letters of naturalisation from the French king, who professed to take him under his special protection. Some years later, in 1631, Grotius was induced by some protestations of friendship from Prince Frederick of Orange, and relying on the general good effect his *Apology* had created in Holland, to return there,

and once more claim the hospitality of his countrymen. But he was doomed to disappointment. Bigotry still prevailed, and he was banished a second time. Grotius now quitted Holland, never to see it again. He first went to Hamburgh, and two years later (in 1634) he entered the diplomatic service of Sweden, and in the following year was appointed Swedish Ambassador at the French Court, a position which he held with honour and distinction for ten years, and proved himself in more than one difficult diplomatic negotiation more than a match for the crafty Richelieu. It was during this eventful period that he completed his *History of the Netherlands* and translated the *History of the Goths and Vandals*, by Procopius. He also wrote a work on *The Origin of the American Nations.*

His Death.—The conduct of the Swedish Embassy by Grotius won the warm approval of his staunch friend the Chancellor Oxenstiern, and Queen Christina, the only child of the great Gustavus, was also very favourable to him. But Grotius took umbrage at the Queen sending a favourite of hers in an ambiguous character to Paris, and, urging his age and increasing infirmities as an excuse, he applied for his recall, which was reluctantly granted, accompanied with most appreciative acknowledgments of his eminent services, which the Queen declared she would never forget. Grotius accordingly left Paris, and arrived at Hamburgh on May 16th, 1645, and from thence he travelled to Lübec and Wismar, receiving everywhere the most honourable reception. At Wismar the Admiral of the Swedish fleet placed a man-of-war at his disposal to transport him to Colmar, from whence he proceeded by land to Stockholm. The Queen was then at Upsal, but on being told that Grotius had arrived at the capital, she at once returned to meet him, and gave him a long audience on the following day, when she again assured him of her royal favour, and begged him to continue in her service as a Councillor of State. For some reason which is not known to his biographers Grotius had resolved to leave Sweden, and when the Queen discovered that he was determined to go, she presented him with a handsome present in money and appointed a vessel to convey him to Lübec. Grotius embarked on August 12th, 1645, but was overtaken by a violent storm, was shipwrecked, and was obliged to take shelter in a port fourteen miles distant from Dantzic. Thence he travelled by land in an open waggon; but his health had been fast failing, and when he reached Rostock (on August 26th, 1645) he was too ill to proceed farther. A physician was called in to attend him, but it was soon evident that recovery was hopeless. Grotius, conscious that his end was near, asked to see a clergyman, and John Quistorpius, a Professor of Divinity at Rostock, attended him in his last earthly moments. Quistorpius found him at the point of death, but still conscious and able to speak, and it is from the hands of the professor that we have a pathetic account of the dying words of the phœnix of Literature, as he calls Grotius. "I found him," he says, "almost at the point of death. . . .

I went on and told him that he must have recourse to Jesus Christ, without Whom there is no salvation. He replied, 'I place all my hope in Jesus Christ.' I began to repeat aloud, in German, the prayer which begins 'Herr Jesu'; he followed me in a very low voice, with his hands clasped. When I had done, I asked him if he understood me. He answered, 'I understand you very well.' I continued to repeat to him those passages of the word of God which are commonly offered to the remembrance of dying persons, and asking him if he understood me, he answered, 'I heard your voice, but did not understand what you said.'" These were the last words of a fleeting spirit whose earthly course had been run, and which then ceased to animate the body of the great Dutchman, just as midnight tolled the close of one and the beginning of a new day. His body received temporary sepulture in the principal church of the city, but was afterwards exhumed and finally deposited in the mausoleum of his ancestors at Delft. His epitaph, written by himself, is mournfully reminiscent in its allusion to his exile, and runs with characteristic brevity as follows:—

GROTIUS HIC HUGO EST, BATAVUM
CAPTIVUS ET EXSUL,
LEGATUS REGNI, SUECIA MAGNI, TUI.

His wife survived him, and is said to have died at The Hague in the communion of the Remonstrants.

His Character.—There is no better means of judging the character of this great man and of forming a correct estimate of the manysidedness of his richly endowed genius than by studying his collection of letters published in Amsterdam in the year 1687. His large sympathies, his freedom from all bigotry yet deep religious sentiment, his abiding interest in all current topics, his profound and almost universal knowledge, and above all his earnest desire to promote peace and union amongst the Christian Churches, are here all brought before us in the familiar style of confidential correspondence with his intimate friends. A spirit of candour and truthfulness pervades all his letters, but not a trace of bitterness or ungenerous criticism is anywhere to be found in them. They are essentially the letters of a pious, learned, and thoughtful man who is keenly interested in the political, literary, and religious questions of the day, which he approaches from the standpoint of a cultured intellect, devoid of bias or prejudice, and with no other aim or desire than to reach a just conclusion. Even his enemies recognised his worth, and thus Salmasius declared that he had "rather resemble Grotius than enjoy the wealth, the purple, and grandeur of the Sacred College." As an instance of his impartiality as an historian, it is pointed out that in his *History of the Netherlands* he does full justice to the merits of Prince Maurice of Nassau, although he had much ground for personal resentment for the injustice he suffered at the hands of that prince. It thus appears that unmerited exile did not

warp his judgment or stifle his patriotism, just as religious controversies did not affect his charity, or the contests of a political career cause him to deviate a hair's breadth from the path of honour and rectitude. His name has been carried down the stream of time untarnished, while his fame as a scholar and jurist seems to increase rather than diminish.

His Magnum Opus.—Of all his numerous works, the one upon which his reputation most solidly rests is his celebrated treatise *De Jure Belli et Pacis*, which has secured for him the lasting reverence of posterity. In an age which produced as his contemporaries a Scaliger, a Bellarmin, a Mariana, a Sarpi, a Bacon, a Pascal, and a Hobbes it is an epoch-making work of this kind which, as Calvo justly says, distinguishes the true man of genius from the ordinary publicist. No work, according to general testimony, has ever received more universal approbation or has maintained its reputation to so high a degree as this treatise of Grotius, who began it in the country house of Balagni, near Senlis, placed at the author's disposal by his friend Jean Jacques de Mesmes, in the month of June, 1623, and practically completed it in June of the following year; a remarkable performance even when we bear in mind that the discovery of a manuscript in 1868 entitled *De Jure Prædæ*, shows that the subject of the treatise had already occupied his attention so early as 1604, and that he was led to its investigation in the active pursuit of his professional vocation, as advocate for the Dutch East India Company, which was formed, it is true, for the peaceful purposes of commerce, but had been compelled, like the English company, to repel force by force. The question submitted to Grotius was as to the legality of a capture made by one of the Company's captains named Heemskirk, a claim which was contested in Holland on the ground that a private company had no right to make prize captures. Grotius undertook to prove that the capture was lawful, and the manuscript treatise discovered by Professor Fruin was the outcome of this effort. It is probable that Grotius was induced by his friend Peiresc to recast the work with the light of his additional experience during the first years of his exile as a mental diversion, calculated to engross his thoughts and lighten the sorrow and burden of banishment. The circumstances of the time also supplied an additional motive for such a literary undertaking. The Thirty Years' War, in the midst of which he wrote, had been waged with such relentless fury, and the miseries of such a protracted and unregulated war had pressed so heavily upon a sensitive nature like his, that he sought to discover some rules by which its horrors and atrocities should be mitigated in the future. "I saw prevailing," he tells us in his Prolegomena (Art. 28), "throughout the Christian world a licence in making war of which even barbarous nations would have been ashamed; recourse being had to arms for slight reasons or no reason; and when arms were once taken up, all reverence for divine and human law was thrown away, just as if men were thenceforth authorised to commit all crimes without restraint." The sight of

these atrocities, as he tells us, had led many estimable men to declare arms forbidden to Christians; but for his own part he took the more practical and moderate view to provide a remedy for both disorders, "both for thinking that nothing [relating to war] is allowable, and that everything is." He felt to some extent prepared for such a task as he conceived by having previously practised jurisprudence in his own country, from which he had been "unworthily ejected"; and he hoped now in exile to promote the same science by further diligent effort. He claims that none of his precursors had treated the subject scientifically, and contends that the only way to do so successfully is by separating Instituted Law from Natural Law. "For Natural Law," he observes, "as being always the same, can be easily collected into an Art; but that which depends upon institution, since it is often changed, and is different in different places, is out of the domain of Art." Special books had indeed been previously written concerning the laws of war, but their authors, he complains, had mingled and confounded natural law, divine law, law of nations, civil law, and canon law. He acknowledges, however, his indebtedness to Balthazar Ayala (who wrote a treatise, *De Jure et Officiis*, which was printed in Amsterdam in 1597), and Albericus Gentilis, an Oxford Professor of Civil Law in 1582 (died 1608), who also wrote a treatise, *De Jure Belli*, first published in 1583. The titles of the chapters of the latter work run almost parallel to those of the first and third books of Grotius, and some of the historical examples cited in the work of Gentilis are also mentioned by Grotius.

But here the extent of borrowing by the Dutch jurist from the earlier author seems to end, for, as Hallam points out, Grotius deals with the subject of each chapter with much greater fulness and is throughout a philosopher, while Gentilis is a mere compiler. What dominates the treatise of Gentilis is the absolute authority of the texts and precedents which he quotes, and to which he slavishly adheres. Grotius, on the other hand, though he ransacks the whole of ancient and later literature, only cites texts and precedents to support his own independent judgment, for which he gives his own reasons. No one, in fact, as Pradier-Fodéré observes, prior to Grotius knew how to unite to the same extent the authority of reason combined with that of experience; his is the fruitful alliance of philosophy and history, which has so profoundly impressed the modern political world. The method which our author adopts is the inductive one. The individual man and his social instinct is the factor producing law and the State; but this *appetitis socialis* is not the mere need for a life spent somehow (*non qualiscunque*) in community with his fellow-men, but tranquilly and as a reasonable being (*sed tranquillæ, et pro sui intellectus modo ordinatæ*), for the welfare of others in contrast to mere utility irrespective of all ethical motives. It is this tendency to the conservation of society, which is in agreement with the nature of the human intellect, that forms the source of Jus or Natural Law, properly so-called. To this Jus belongs the rule of abstaining from

that which belongs to other persons; and if we have in our possession anything of another's, the restitution of it, or of any gain which we have made from it; the fulfilling of promises, and the reparation of damage done by fault. In short, the special office of Jus properly so-called is "to leave to another what is his, to give to him what we owe." In a general sense Jus is divided into Natural Law and Voluntary or Positive or Instituted Law. The former is the dictate of right reason, indicating what is in agreement or disagreement with the rational and social nature of man, and therefore either commanded or forbidden by the Author of Nature; the latter is subdivided into *divinum* or *humanum*, according as it is ordained by God or prescribed by man, either as a rule of the Jus Civile or of the Jus Gentium. In this way he leads up to the humane principle which pervades his whole treatise, that between individuals, as between nations, it is not Utility but a common law of Rights which is of force in governing their mutual relations. To have established this principle and to have extended its operation to the conduct of war was to have justified his claim to be regarded as the founder, or, as Marten calls him, the father, of the science of International Law, and to be called, as Vico suggests, "the juristconsult of the human race." That his work is not perfect, that he does not conceive as clearly as some later jurists—like Christian Thomasius, for instance—have done the distinction between religion on the one hand, and law and morality on the other, and that he has not completely succeeded in disentangling himself from the bewildering maze of incoherent and arbitrary notions of ethical philosophy which prevailed in his time, may be conceded without detracting from his general merits, as one who, in the midst of a cruel and desolating war, was the first to discover a principle of right and a basis for society which was not derived from the Church or the Bible, nor in the insulated existence of the individual, but in the social relations of men, and to make it thus easy for those who followed him to broaden the pathway he had broken, and to elaborate his science. Thus it was through the treatise of Grotius that the idea of a law of nature came to influence the ethical and political speculations of Locke, Rousseau, and a host of later writers. So that, whatever defects and confusion there may be in the theory of Grotius, his great work still commands respect throughout Europe, and the opinion of Mackintosh no doubt expresses the prevailing view of the learned world of the present day. "It is perhaps," he says, "the most complete [work] that the world has yet owed, at so early a stage in the progress of any science, to the genius and learning of one man." Hallam has also vigorously defended Grotius against the criticisms of Dugald Stewart, which were not characterised by much acumen or sobriety of judgment, and every sentence of which, it is no exaggeration, in the opinion of Hallam to say, would lie open to counter and destructive criticism. Stahl again,[1] is another severe critic, who sees in the doctrine of Grotius

[1] *Philosophie des Rechtes*, vol. i. pp. 158-170.

an attempt to make the whole scheme of Natural Law in its final analysis rest on the obligation of compacts,[1] which is likewise the Mother of Civil Rights, and which only needed the further development it received at the hands of Kant and Rousseau to lead directly to the French Revolution. Grotius, in fact, makes *obligation* the dividing line between a rule of moral right *obligans ad id quod rectum est* and *consilia honesta*, a sort of counsel of perfection which is not included in *Jus* or Law (*legis aut juris nomine non Veniunt*, 1. 1. 9). It was Grotius, Stahl contends,[2] who first gave expression to the notion that the State has no authority in itself over men otherwise than by virtue of a compact, and it has no other purpose to serve but that of individual men. It is thus the germ of that theory which a century later was to overwhelm the political order of Europe; like a mere snow flake, it is true, at first, but which, set loose from the crest of a mountain, gains increasing volume in its whirling descent, until it falls at length with the accumulated force of an avalanche into the depths of the valley below. But despite all adverse criticism, we cannot forget that it was Grotius who gave, by this treatise, the deathblow to the Machiavellian policy *des Lugs und Trugs*, as Ahrens calls it,[3] and rendered possible the Peace of Westphalia, which marked the commencement of a new era proclaiming the legitimacy of reform, and consecrated the complete equality before the law of all religions. So large was the demand for this work that it passed through no less than forty-five editions up to 1758 A.D., and became a text-book in all European universities. But the author himself derived little pecuniary profit from it, his honorarium consisting of two hundred free copies, of which he had to give away a large number to friends, to the French King, and to the principal courtiers at the court of France, the remaining copies being sold at a crown apiece, which did not even recoup him his actual outlay. The great Gustavus Adolphus of Sweden so highly prized the work that he carried it with him in his wars, and a copy was found under his pillow after the battle of Lützen. On the other hand, it was condemned by the Papacy and entered in the *Index Expurgatorius*, a condemnation which Barbeyrac quietly observes, was really the highest honour, for otherwise one might have erroneously believed that the author favoured the principles and interests of a monarchy destructive of all the laws of nature and of nations.[4]

His Remaining Works.—Besides those already mentioned, Grotius was also the author of the following works:

(1) *The Comparative Merits of the Athenian, Roman, and Batavian Nations* (1602).

(2) *Mare Liberum* (*de Jure quod Batavis competit ad Indica commercia*), a notable treatise in which he maintained, against the pretensions of the Portuguese that the Eastern Seas were their private property, that all oceans

[1] See Prolegomena, s. 15, 16.
[2] *Philosophie des Rechtes*, p. 169, 2nd edit.
[3] *Naturrecht*, s. 16, p. 93.
[4] P. 7, Preface to Translation.

are free and cannot be appropriated by any one nation. This essay, which is really a chapter of the *De Jure Prædæ*, was printed separately in 1609, without, as Grotius tells us, his permission, and appears to have aroused little attention at first. But in 1632 the doctrine laid down by Grotius was vigorously assailed by Selden in his *Mare Clausum*, in which the right of England to exclude the fishermen of Holland from seas which she then claimed as her own was sustained with a profusion of learning which Grotius was the first to acknowledge. But while Selden was fitly honoured by his own king and country for his patriotic effort to maintain a doctrine which coincided with the insular position as well as with the national pride in the maritime supremacy of England, the countrymen of Grotius reserved nothing better for him than imprisonment and exile. The lapse of three centuries has, however, vindicated the freedom of navigation on the open seas claimed by Grotius. And modern international jurisprudence has since adopted the theory propounded by Bynkershoek in his *De Dominio Maris* of the cannon-shot limit. Russia indeed endeavoured in the last century to revive the old controversy in connection with Behring's Sea and Alaska, and still more recently the United States claimed, as successors to Russian dominion over Alaska, beyond the Bynkershoek limit, but ineffectually.[1]

(3) *Hugonis Grotii Poemata Omnia*, first published in 1616, containing a collection of his patriotic poems, epigrammata, elegies, marriage songs, silvæ, and three dramas, which, if they do not entitle him to be ranked as a poet of genius, are at all events compositions of considerable merit in point of scholarship and elegance of diction.

(4) *Excerpta ex Tragediis et Comediis Græcis, emendata ex Manuscriptis et Latinis Versibus reddita* (1626).

(5) *Euripidis Traged. Phenissæ, emendata ex Manuscriptis, et Latina Facta ab Hugone Grotio* (1630).

(6) *Lucani Pharsalia, sive de Bello Civili inter Cæsarem et Pompejum, libri X.* (1609), a valuable edition with a carefully revised text and critical notes.

(7) *Florilegium Stobæi* (1622), the Greek text with the Latin translation of the poetical passages from the ancient poets; and it was in the spirit of the collection of Stobæus, which embraced several hundred excerpts, that Grotius a few years afterwards (1626) published a continuation of the same in his own excerpta from the Greek tragedians and comedians referred to above under (4).

Finally, at the age of sixty, we still find the indefatigable scholar preparing a learned and metrical Latin translation of the Greek Anthology, according to a Greek manuscript text which Salmasius had discovered in the year 1606 in the celebrated *Bibliotheca Palatina* at Heidelberg, which he did not live to see published, but which was afterwards edited by a countryman of his own and printed with the Greek text in the year 1795.

[1] Trendelenburg, *Naturrecht*, s. 220, p. 573.

In this, as in all his works, he displays the same desire after thoroughness, elegance, and accuracy, looking, as he tells us in his own graceful verse, merely for the gratification of his peaceful desires and expecting his reward from a grateful posterity:

> Accipe, sed placidé, quæ, si non optima, certé
> Expressit nobis non mala pacis amor.
> Et tibi dic, nostro labor hic si displicet ævo,
> A gratâ pretium posteritate feret.

Such, briefly told, was the life and work of one of the most remarkable prodigies of the human intellect which the world perhaps has ever produced—a veritable giant among intellectual giants, as to whom posterity has long confirmed the prophetic words of Henri IV. of France, pronounced when Grotius was still in his early teens—*Voilà, le miracle de la Hollande!*

for our subjects," and the earlier patent was declared to be "prejudicial to the public, . . . and upon deliberate advice with the Lords and others of our Privy Council" a fresh patent was granted free of rent and royalties, but without any restraint on the importation of foreign-made glass. Mr. Gordon observes that the issue of this patent was in substance and effect the grant of a compulsory licence in 1624, and he compares the position of Sir R. Mansell to that of the petitioners in the Wolverhampton petition to the Board of Trade in 1899.

The provisoes appeared in various forms in the earlier patents. Several cases are discussed (Rep. 1901, Cd. 530, p. 164), in some of which conditions are introduced respecting the working of the patent in the country, the prices to be charged to users, and the quality of the goods produced. Mr. Gordon arrives at the conclusion that under the defeasance clauses at the date of the Statute of Monopolies the points on which a patent would be liable to be attacked would be the failure of the patentee as to: (1) The continuous production of the patented article in sufficient quantity; (2) maintaining a sufficient stock of it on hand; (3) keeping up its quality to a prescribed standard; and (4) selling it at easy and reasonable prices with reference to a standard price.

It appears that patentees were wont to resort to the Privy Council for enforcement of their rights; the Council Board and Star Chamber granted injunctions in the form of Letters of Assistance (Rep. 1901, Cd. 530, p. 165). In many cases the patentees abused their privileges. Two instances may be here given which are interesting on account of their close similarity to certain proceedings adopted by patentees at the present day. In the great debate on the subject of Monopolies on November 20th, 1601, Mr. Spicer, M.P. for Warwick, referred to the case of an agent of the patentee for aquavitæ and vinegar, who came to Warwick and "presently stayed sale of both these commodities; unless the sellers would compound with them, they must presently to the Council Table. . . . They exceeded [their patent] in three points; for where the patent gives four months' liberty to the subject, that hath any aquavitæ to sell the same, this person comes down within two months and takes bond of them to his own use, where he ought to bring them before a Justice of the Peace, and they there to be bound in recognisance, and after to be returned into the Exchequer; and so by usurpation, retaineth power in his own hands to kill or save" (Cobbett's Parl. Hist., vol. i. col. 924).

Another form of abuse of the remedy is mentioned on November 25th by Sir R. Cecil, speaking on behalf of Her Majesty. "There are no Patents now of force, which shall not presently be revoked; for what Patent soever is granted, there shall be left to the overthrow of that patent, a liberty agreeable to the Law. . . . In particular, most of these patents have been supported by Letters of Assistance from Her Majesty's Privy Council; but whosoever looks upon them shall find, that they carry no other stile,

than with relation to the Patent. . . . But to whom do they repair with these Letters? To some outhouse, to some desolate widow, to some simple cottage, or poor ignorant people, who rather than they would be troubled and undo themselves by coming up hither, will give anything in reason for these caterpillar's (*sic*) satisfaction" (Co. Parl. Hist., vol. i. col. 934). So to-day we have restrictions and conditions imposed by means of Conditional Licences, and also the selection of the retail seller or individual purchaser as a defendant in an action for infringement!

The remedy for these abuses consisted in the insertion of provisoes in the letters patent themselves. It is hard to ascertain when these were first inserted, perhaps not long after the Statute of Monopolies. These have been continued down to the present time. Every patent contains a proviso in the following terms: "Provided that these our letters patent are on this condition, that if at any time during the said term it be made to appear to us, our heirs or successors, or any six or more of our Privy Council, that this our grant is contrary to Law, or prejudicial or inconvenient to our subjects in general, etc., these our letters patent shall forthwith determine and be void to all intents and purposes," etc. By this proviso a respondent was enabled to raise the question of the invalidity of the patent before the Courts of Law and the Privy Council.

Before the passing of the Statute of Monopolies there was published (A.D. 1610) King James's "Declaration of His Majestie's Royall pleasure . . . in matters of Bountie," in which he prohibited requests to be made to himself in matters of monopoly, excepting patents for "projects of new invention, so they be not contrary to the Law, nor mischievous to the State, by raising prices of commodities at home, or hurt of trade, or otherwise inconvenient."

The Statute of Monopolies.—This Act was passed in 1624, and declared the Common Law to be that the grants of monopolies and dispensations by the Crown were illegal, except in cases of "letters patents and grants of privilege for the term of fourteen years" (in the case of existing patents twenty-one years) "or under . . . of the sole working or making of any manner of new manufactures within this realm to the true and first inventor and inventors of such manufactures, which others at the time of making such letters patents and grants shall not use, so as also *they be not contrary to the law nor mischievous to the State, by raising prices of commodities at home, or hurt of trade or generally inconvenient*; the said fourteen years to be accomplished from the date of the first letters patent or grant of such privilege hereafter to be made, but that the same shall be of such force as they should be if this Act had never been made, and of none other." The passage in italics is evidently taken from the King's Declaration already mentioned; but the concluding words of this sixth section preserve the limitations previously recognised by law. What these may be depends on the policy of the law and on commercial policy generally. In com-

menting on this section, Sir Edward Coke in his *Institutes* (III. c. 85 [184]) gives as an illustration of an invention that was "generally inconvenient" the case of an invention whereby bonnets and caps were thickened in a fulling mill instead of by hand, the mill taking the place of fourscore men: "for it was holden inconvenient to turn so many labouring men to idlenesse." Such illustrations seem curious to-day, when political economy has been developed as a science, and the principles of our commercial policy are so different from those adopted in the seventeenth century. But the underlying principle of the law is still the same—viz. *that the monopoly granted to the inventor is not an absolute one, but is qualified by conditions that are imposed in the interests of the public.* That the concluding words of the section had a real meaning is seen from the comments of Sir Edward Coke, and from the reason he gives why the statute did not declare that patents for inventions were good, but left it in each case to the application of the Common Law—viz. "but it was thought that the times limited by this Act were too long for the private, before the Commonwealth should be partaken thereof, and such as served such privileged persons by the space of seven years, in making or working of the new manufacture (which is the time limited by law of apprenticehood) must be apprentices or servants still during the residue of the privilege, by means whereof such numbers of men would not apply themselves thereunto as should be requisite for the Commonwealth after the privilege ended. And this was the true reason whereof both for the time passed and for the time to come they were left of such force as they were before the making of this Act." A passage is given in the old text books and digests (Comyns Dig., Tidd's Practice, etc.) from Dyer (276 *b*): "So if a patent be made to the prejudice of another, he may have a *scire facias* to repeal it: as, if a market, fair, etc., be granted to be the annoyance of an ancient market of another." This occurred in the case of *R.* v. *Eyre* (1 Strange's Rep. 43), where the second market was granted at a distance of four miles from the first, and the patent for it was revoked.

The law is thus enunciated in Godson on Patents (1840, p. 268): "Hence it is evident, that if an issue were joined on certain facts stated in the record of *scire facias* which showed that the patent had a tendency to produce any of the bad effects, of being contrary to the law, hurtful to trade, or generally inconvenient, such issue would be capable of trial; and the patent might on that account be declared to be void." Lord Thurlow (Lord Chancellor), in speaking of patents for theatres, expressed the opinion that "even if they were in fee, they would not stand half an hour if abused." But there is no case reported of a patent for an invention having been attacked for being "hurtful to trade, or generally inconvenient," except in two cases (*R.* v. *Arkwright*, Godson on Patents, p. 265, and *Gillet* v. *Wilby*, 9 Carrington & Payne 334) in which the Court held that the pleading was too general, and the pleas were not

gone into. There is no report or dictum to the effect that the remedy was not available on the requisite facts being proved. The absence of such cases may be accounted for by the fact that the proviso was originally directed against the grants of monopolies for doing something that was known or had been done by others at the time.

When patents were defined as being valid only for new inventions, in most cases it was unnecessary to resort to defeating the patent as being "hurtful to trade or generally inconvenient," as a clear issue arose in the plea of want of novelty. But the principle is recognised at the present day; it is a sufficient defence to an action for infringement for the defendant to show he is only doing what he or others have already done or been in a position to do at the date of the patent. In such a case the patent either (*a*) does not include what has been done by the defendant, or (*b*) is invalid on either the ground of want of novelty, or of want of subject matter. As to subject matter Lindley L.J., in speaking of cases in which there are no difficulties to be overcome, or the cases in which the mode of overcoming the so-called difficulties is obvious to every one of ordinary intelligence and acquaintance with the subject matter of the patent, said: "Such cases present no real difficulty to people conversant with the matter in hand, and admit of no sufficient ingenuity to support a patent. If, in these two classes of cases, patents could be supported, *they would be intolerable nuisances* and would seriously impede all improvements in the practical application of common knowledge. They would be '*mischievous to the State*,' to use the expression in the statute of James" (*Gadd* v. *Mayor of Manchester*, 9 Rep. Pat. Ca. 524). Thus a patent for an invention that does not exhibit a sufficient amount of ingenuity, or, in other words, is wanting in subject matter, may be regarded as being "hurtful to trade and generally inconvenient." It may be observed that, besides want of subject matter, inutility may well be considered as hurtful to trade, and for that reason a ground of invalidity. The reason for this is to prevent a patentee who obtains a patent for an invention which is in fact unworkable and a failure from obstructing the patentee of a subsequent invention which turns failure into success.

The Mischief to be Remedied.—The law regarded the importer of a new manufacture as being in the same position as the inventor, the benefit to the trade of the country by the new industry introduced being the same in each case. Until the latter half of the nineteenth century it was the policy of the country to protect the British workman by restricting the importation of articles that competed in the market with the products of his labour. But during the last half-century there was a great change in this respect, and it was considered to be in the public interest to encourage the importation of foreign goods, although they competed with British in the home market. There was no corresponding change in the Patent Laws, consequently it became possible for foreign manufacturers to obtain British

patents and use their rights to crush British competition. Patents were used to produce a result the exact opposite to that contemplated by the Legislature when it passed the Statute of Monopolies. A conspicuous instance of this is the case of the manufacture of dyes from coal tar. In 1868 "alizarin," the colouring matter of madder, was produced artificially. Germans secured British patents and declined to allow the dye to be made in England. The raw material was produced in England, and there was a large demand for completed product in the country. The whole trade of Turkey-red dyeing and calico printing was affected. The German manufacturers gradually raised their prices, and six months before the expiry of the patent refused to supply any dye unless under a contract extending over a period of two years. Dyers had to go on short time for eighteen months. This action of the German manufacturers bears a certain similarity to that of the patentee of aquavitæ and vinegar mentioned above. Under a policy of free imports there is not such a supervision at the ports as could be adopted to the purpose of examining and excluding articles made by a patented process, and it is therefore impossible to adopt the remedy followed in some countries of compelling the patentee to work his patent in the country for the supply of the home market. The remedy adopted was provided by the Act of 1883.

The Act of 1883.—Under this Act (s. 46) an "invention" is defined as "any manner of new manufacture the subject of letters patent and grant of privilege within s. 6 of the Statute of Monopolies," etc. The result of this definition is that the law, as far as regards the validity of a patent, rests on the same legal principles as before the passing of the Act. The proceeding by *scire facias* to repeal a patent was abolished; but it was enacted that "every ground on which a patent might, at the commencement of this Act, he repealed by *scire facias* shall be available by way of defence to an action of infringement, and shall also be a ground of revocation." The defeasance proviso is preserved in the patent itself. The remedies therefore discussed in the preceding pages are, in theory at least, still available. During the hearing of the evidence by the Departmental Committee of 1901 [Cd. 530, q. 1880] Sir Edward Fry expressed the opinion that "a patent may be revoked that is inconvenient or prejudicial to the public."

By s. 22 the Board of Trade in certain cases was empowered to order the patentee, on the petition of any person interested, to grant licences on such terms as they deemed just. But the petitioner had to prove that by reason of the default of the patentee to grant a licence on reasonable terms, (*a*) the patent was not being worked in the United Kingdom, or (*b*) the reasonable requirements of the public with respect to the invention could not be supplied, or (*c*) any person was prevented from working or using to the best advantage an invention of which he was possessed. For a considerable number of years no attempt was made to put this enactment into operation. This delay was partly accounted for by the

fact that the section applied only to patents granted after 1883, but was also due perhaps to the simpler cause that lawyers overlooked or forgot all about the provisions of this 22nd section. However, it has now been put in force in some eight or nine cases. The remedy of compulsory licences involved the fixing of the amounts of royalties by a tribunal. It was two years earlier that the Legislature established, at the cost of the State, a tribunal for fixing the rents of agricultural land in a large part of the kingdom; hence the new policy was not altogether unprecedented.

The practice adopted by the Board of Trade was to refer the cases to referees, who heard counsel, took evidence, and made a report to the Board, who then decided as to the refusal or grant of the licence, and the conditions to be inserted in such grant. One difficulty that arose is illustrated by the case of the Meister Lucius patents. These patents were for the manufacture of certain sulphoacids of oxynaphthaline which were not useful themselves as dyes, and the British patents for their manufacture were held by a foreign firm. These substances were not produced, as there was at first no demand for them. But an English chemist, Mr. Levinstein, patented a process for making certain dyes that were of great commercial value. The raw materials in this manufacture were the sulphoacids the subject of the Meister Lucius patents. The patentees did not make their sulphoacids in England, and refused to grant him a licence to make them, so a petition was presented to the Board of Trade. A licence was granted, as prayed by the Petitioners. But in the case of a foreign company there was no method by which the order could be enforced.

The Departmental Committee, to which reference has already been made, enquired into the working of this section [Par. Rep. 1901, Cd. 506].

Objection was taken by some of the witnesses to the tribunal, constituted of the Board of Trade and a referee, on the ground that the pecuniary interests involved were very large, that the person who heard the evidence and made the report was not the one on whom the responsibility for the decision rested, and that the reasons for the decisions were not published.

It was reported by the Committee that the founding of the jurisdiction on one or other of the three events mentioned above which were the result of the default of the patentee to grant licences, created much difficulty, especially the interpretation of the condition that "the patent was not being worked in the United Kingdom." Amongst other suggestions, they recommended that the jurisdiction be transferred to the High Court, with appeal to the Court of Appeal and, with leave, to the House of Lords. A Bill was introduced in 1902 to give effect to the recommendations of this Committee. While it was being considered in the House of Commons, it was amended, at the instance of the President of the Board of Trade, by the substitution of the Privy Council for the Supreme Court. In a note to the Report, Sir Edward Fry records his

objection to the fixing of royalties by a public tribunal, and instead of a compulsory licence recommended a scheme for the defeasance of the patent. He wrote: "In the next place, the provision which exists in all letters patent for inventions (though it has fallen into desuetude) for their determination if it be made to appear to six Privy Councillors that the grant is prejudicial or inconvenient to Her Majesty's subjects in general suggests a close precedent for such a course as I suggest." The Committee recommended a fresh definition of the events on which the jurisdiction is proposed to arise.

The objection to the remedy of defeasance of the patent is that it is not in the interest of other manufacturers, who are usually the petitioners, to have the invention in question thrown open to all, as they could not in such a case share in the benefits arising from the monopoly. Mr. Edward Carpmael pointed out (Rep. 1901, Cd. 530, p. 9) that "there appears to be in Europe an increasing objection to compulsory working, and a growing agitation to abolish it, or at least to replace it by compulsory licences. The effect of this agitation is evidenced by several recent laws, for example those in Austria, Finland, Hungary, Norway, Sweden, and Switzerland." The remedy of compulsory working can only be carried out as part of a large scheme of Protection, and, as has been pointed out, cannot be carried out in this country with the present customs staff and arrangements.

The Act of 1902.—The new provisions differ from, and are much wider than, the old in three respects: (1) the definition of the events that give rise to the jurisdiction; (2) the change of the tribunal to the Judicial Committee of the Privy Council; and (3) the remedies provided. As regards the first of these alterations, s. 3 (1) enacts: "(1) Any person interested may present a petition to the Board of Trade alleging that *the reasonable requirements of the public with respect to a patented invention have not been satisfied*, and praying for the grant of a compulsory licence, or in the alternative for a revocation of the patent." The words here printed in italics show that the events in which the jurisdiction arises have been considerably enlarged. Their precise scope cannot be defined until some petitions have been heard, and the views of the Judicial Committee published in their recommendations on the cases before them.

The preliminary steps are taken before the Board of Trade, and provision is made to give the parties an opportunity of considering their respective positions, and to stop frivolous applications. Sub-s. (2) enacts: "The Board of Trade shall consider the Petition, and if the parties do not come to an arrangement between themselves, the Board of Trade, if satisfied that a *primâ facie* case has been made out, shall refer the petition to the Judicial Committee of the Privy Council, and, if the Board are not so satisfied, they may dismiss the Petition." For this purpose the petition must show the nature of the petitioner's interest, and give the grounds upon which the claim to relief is based, the circumstances of the

case in detail, the terms upon which the petitioner asks that an order be made, the purport of the order, the name and address of the patentee and other persons alleged to have made default (Pat. Rules 69). The petition and affidavits or statutory declarations in proof of the allegations in the petition must be filed at the Patent Office, and copies sent to the alleged defaulters named in the petition (Rule 70). Evidence in opposition and in reply must be filed within the prescribed time (Rule 71). The Board take into consideration the probability of the parties coming to an arrangement; and if they are satisfied that a *primâ facie* case has been made out and no arrangement is likely to be affected, they send the petition, the evidence that has been filed, and any other information they have respecting the case, to the Privy Council (Rules 74, 75).

The remaining sub-sections [(3)—(11)] deal with the procedure before the Judicial Committee: "(3) Where any such petition is referred by the Board of Trade to the Judicial Committee, and it is proved to the satisfaction of the Judicial Committee that the reasonable requirements of the public with reference to the patented invention have not been satisfied, the patentee may be ordered by an Order in Council to grant licences on such terms as the said Committee may think just, or, if the Judicial Committee are of opinion that the reasonable requirements of the public will not be satisfied by the grant of licences, the patent may be revoked by Order in Council; Provided that no order of revocation shall be made before the expiration of three years from the date of the patent, or if the patentee gives satisfactory reasons for his default."

The Judicial Committee (of whom three members constitute a quorum—sub-s. 10) are thus placed by the Legislature in a position to remedy the principal grievances. In this connection it is interesting to quote a passage from *Monopolies by Patents* (p. 130): "It seems reasonably certain that in earlier times proceedings before the Privy Council afforded an effective mode of cancelling a mischievous patent, and there is no reason in principle why this condition" (the defeasance proviso in the patent) "should not now be enforced against a patentee if need were. Queen Elizabeth recalled many of her patents apparently in this way." Without interfering at all with that jurisdiction, the power to revoke a patent conferred by this Act on the Judicial Committee has been limited to the cases in which a compulsory licence will not be an effectual remedy, and the patent has been three years in force.

One cannot predicate what will be considered to be the "reasonable requirements of the public." Are the public requirements, say as to cycle brakes, reasonably met if the public are told, "You shall only use those brakes which you have made, and for which we have received royalties, on machines of a certain make"; or in the case of incandescent mantles, "You shall not use these articles, bought by you and now your chattels, on pain of forfeiture, unless on burners bought from the patentee"? Such claims are at the present day put forward before the Courts by patentees.

The Act further provides for persons interested in opposing the petition and the Law officers of the Crown being heard.

The mischief caused by foreign manufacturers holding blocking patents, such as those for dye substances mentioned above, is specially dealt with in the fifth sub-section: "If it is proved to the satisfaction of the Judicial Committee that the patent is worked, or that the patented article is manufactured exclusively or mainly outside the United Kingdom, then unless the patentee can show that the reasonable requirements of the public have been satisfied, the petitioner shall be entitled to an order for a compulsory licence, or, subject to the above proviso, to an order for the revocation of the patent." Under the rules the petitioner must give full particulars of the circumstances on which he bases his case, and in what respects he alleges that the reasonable requirements of the public (of whom he is one) have not been satisfied; therefore this enactment will have the effect of putting on the respondent the onus of disproving the statements made—the petitioner having merely to prove that the patent is not worked in the United Kingdom.

The Departmental Committee commented on certain difficulties in the interpretation of s. 22 of the Act of 1883. To meet these objections certain conditions are laid down in sub-s. (6). It will be seen that the conditions specified in s. 22 of the Act of 1883, under which the relief is granted, are enlarged in the present Act. This will be easily seen by comparing the old and the new in tabular form:—

	S. 22, *Act of* 1883.	*S.* 3, *Act of* 1902, *sub-s.* (6).
Causes	If on the petition of any person interested it is proved to the Board of Trade that	For the purposes of this section the reasonable requirements of the public shall not be deemed to have been satisfied if
Causes	by reason of the default of the patentee	by reason of the default of the patentee
Causes	to grant licences on reasonable terms,—	to work his patent or to manufacture the patented article in the United Kingdom, to an adequate extent or to grant licences on reasonable terms,
Consequences	(*a*) The patent is not being worked in the United Kingdom; or	(*a*) any existing industry or the establishment of any new industry is unfairly prejudiced, or
Consequences	(*b*) The reasonable requirements of the public with respect to the invention cannot be supplied; or	(*b*) the demand for the patented article is not reasonably met.
Consequences	(*c*) Any person is prevented from working or using to the best advantage an invention of which he is possessed; The Board may, etc.	

Under the new Act the petitioner in the first case (*a*) must show that his industry is "unfairly prejudiced." This condition excludes the petitioner who is not in a position financially to carry on the manufacture, and also the case of a petitioner who seeks the licence with a view merely to sell goods made abroad. The second case (*b*) under the Act of 1883 is now replaced by the whole section (sub-s. 3 *supra*) and is therefore not limited to cases arising from the patentee's default to grant licences. The third case under the earlier Act is enlarged, and the petitioner need not show that he is possessed of an invention—he need only show that the new industry in which he is interested is "unfairly prejudiced"; *e.g.* in the Levinstein case the petitioner was the inventor of a new dye and was in "possession of" his invention, for which he wished to make the sulphoacids. Under this sub-section "the establishment of" a new industry of making certain dyes would be "unfairly prejudiced."

The difficulty that arose under the old practice of enforcing an order for a licence against foreigners outside the jurisdiction of the Courts has been met by sub-s. (7) in the following terms: "An Order in Council directing the grant of any licence under this section shall, without prejudice to any other method of enforcement, operate as if it were embodied in a deed granting a licence and made between the parties to the proceeding." Sub-s. (8) gives power to the Judicial Committee to make rules, and provides that its orders and Orders in Council may be enforced by the High Court as if it were an order of the High Court.

The Privy Council has made rules regulating the procedure to be observed, the parties to be heard, and the advertisements of the hearing. Under these the documentary evidence before the Board of Trade may be received in evidence, subject to such cross-examination of the deponents as may be permitted by the Committee; further documentary and other evidence may be tendered; and counsel are heard.

The Committee may "refer any matters in connection with proceedings under this Act to be examined and reported on in the same manner" as matters may be referred by them under s. 17 of the Judicial Committee Act, 1833 (Rule 13). The reference is made in the form of an Order in Council. In the one reported case in which this power has been exercised the directions to the referee included a power to make interim reports, and to appoint another person to take evidence abroad. The powers that can be thus exercised are of the fullest nature, the referee having the power to administer oaths. The Judicial Committee, in the Order in Council appointing a referee, will probably give very full directions as to the way in which the reference is to be conducted and the report made. The final decision of the Committee will be given in open Court as is now done in cases of petitions for prolongation.

The costs of and incidental to all proceedings are to be in the discretion of the Committee. In considering costs the Committee "may have regard

to any previous request for, or offer of, a licence made either before or after the application to the Committee." The order directing the taxation of costs will be made by the Committee, who will have thereby power to check abuses caused by persons bringing petitions from indirect motives, or by rich corporations attempting to get the better of a petitioner by the power of the purse. The actual taxation will be carried out by the Registrar or other officer deputed for that purpose. The employment of expert witnesses will be checked by Rule 15, which directs that the "Registrar or such other officer shall have authority to allow or disallow in his discretion all payments made to persons of science or skill examined as witnesses."

The Act applies to patents granted before as well as those granted after its passing.

THE MAKING OF THE GERMAN CIVIL CODE.[1]

[*Contributed by* A. PEARCE HIGGINS, LL.D.]

IT is now eight years since the new German code received the Imperial sanction, and rather more than four years and a half since it came into force. Already two French translations[2] have appeared, and the first volume of a translation undertaken by the authority of the French Ministry of Justice has recently been published. This last translation, which is the work of seven distinguished professors and advocates,[3] is accompanied by an exhaustive commentary, and its publication had been anticipated by one of the translators, Prof. Saleilles, who early in the present year published an *Introduction à l'étude du Droit civil allemand.*[4] The new French translation serves once more to call the attention of lawyers in this country to this extraordinary legislative work. Hitherto it has not received here the study or notice which it deserves. A few articles in law magazines, some references to it in lectures in the Inns of Court and Universities, are all the evidence of attention bestowed on it by our lawyers. No translation has appeared here, nor, as far as the writer knows, in any English-speaking country. Meantime the publication of the French translations tends to make the contents of this monument of German science and patriotism more accessible to British lawyers.

The enactment of the German code is pregnant with possibilities for future attempts in a similar direction in other countries. It is especially worthy of study in Great Britain, where the unity of the United Kingdom is far from being an accomplished fact, so long as questions of domicile and conflicts of laws are discussed as if England and Scotland, united politically, but still independent as regards their legal systems, were separate states.

[1] Based on a paper read at a meeting in Clare College of the Cambridge Law Club.

[2] One by M. Raoul de la Grasserie, the other by M. O. de Meulenaere.

[3] Prof. Bufnoir (Paris), M. Challamel (Avocat, Paris), M. Drioux (Avocat-Général, Orleans), Prof. Gény (Nancy), M. Hamel (Paris), Prof. Lévy-Ullmann (Lille), Prof. Saleilles (Paris).

[4] Paris: Librairie Cotillon. The writer here desires to make his acknowledgments to Prof. Saleilles' work for much assistance in preparing the following paper, and he refers readers who desire a general account of the contents of the code to it. See articles by Prof. Walton in vol. xvi. *Juridical Review* (June 1904), p. 148, and by Dr. Schuster in vol. xii. *Law Quarterly Review*, p. 17.

The Code and National Unity.—The circumstances of the preparation of the code are noteworthy, and may at some future date be deemed worthy of close attention in this country. They are unique in the history of legislative reforms. The codes of Justinian and Napoleon, which have exerted such tremendous influence on the world, were produced under the direction and at the commands of despotic rulers. The German code, however, is the result of a great national desire for unity, which was an outcome of the Napoleonic wars; a desire fostered at the time of the formation of the Germanic Confederation in 1815, firmly based on its ruins in 1866, strengthened by the Franco-German War and the foundation of the German Empire in 1871, and finally consummated in 1896. In that year, for the first time in the history of Germany, there came into being a veritable common law, which, sweeping away all anomalies and local customs, was after January 1st, 1900 (the commencement of the twentieth century, according to the Kaiser's reckoning), to regulate the relations of all the members of the German Empire in the most important details of private law.

To codify a nation's laws, even if their development were uninterrupted and continuous, can never be an easy task, but in Germany the task was especially difficult, and when the circumstances, both political and legal, under which the German code was produced are taken into consideration, the success which attended the efforts of the nation is all the more striking. These circumstances have to be considered, not only to appreciate the magnitude of the task undertaken, but even to understand the result obtained, for the interpretation of many of the articles of the code apart from a reference of pre-existing law and the method of their production would frequently prove either impossible or erroneous.

The publication in Germany since 1896 of works explanatory of the text and descriptive of its origin bears witness that to the Germans themselves there is need for elucidation of the short but not infrequently involved sections of the code. A bibliography of works bearing on the subject has been published annually since 1899, and already contains many hundreds of entries.[1]

The actual history of the present code commences with the birth of the modern German Empire, but no account of its preparation would be complete or intelligible without a sketch of the movements which preceded it; these movements again are unintelligible unless the pre-existing legal conditions are first noticed. In the "three R's"—Renaissance, Reformation, and Reception [2]—of which Prof. Maitland has spoken in his Rede Lecture, Germany took its full share. In 1495 the Empire "received" the Roman law as its common law. It has become the practice in Germany in recent years to speak in terms of the greatest disrespect of this recepiton,

[1] **Maas**, *Bibliographie des bürgerlichen Rechts.*

[2] Maitland, *English Law and the Renaissance*, pp. 9, 46.

but it is forgotten that the "unity so ardently desired, so strenuously fought for, and so laboriously acquired in the nineteenth century the Roman law had realised under a form at once scientific, practical," and supple, and that to the Roman law Germany owed the marvellous development of its legal school in the nineteenth century.[1] The Roman law as "received," though in theory Justinianian, was in practice the law that had been elaborated by a long race of Italian commentators and glossators. This "reception" also was only as a supplement to the local customary law; "it came to the aid of particularism." Whole departments of law affecting the everyday life of the people—family law, land law, marriage, succession—were for centuries largely governed by old Germanic customs as they had been transformed by feudal influences. It was in the law of obligations that Roman law exerted its greatest force. The local customs, however, after the reception required to be proved as such, while the Courts took judicial notice of the Roman common law, and as proof was ofttimes difficult, the chief Germanic survivals came from those customs which had been reduced to writing.[2]

The Movement for Codification.—When the first movement for codification began in the seventeenth century, under Conring and Liebnitz, all that was then meant was to translate into the vulgar tongue the Roman law, which was an instrument ready to hand to produce a community of interest.[3] In the eighteenth century, with the revival of historical study, interest began to centre in the Germanic survivals, and the philosophic movement of the "natural law" school towards codification included these, or such of them as conformed to its ideal, within its scheme. The centuries which had passed since the reception had also had their influence on the Roman law, which had become permeated with Germanic ideas, whilst in turn the Roman law worked into the intellectual life of the German people.

The first code to be brought to a completion was that for the Kingdom of Prussia. In 1746 Frederick the Great issued an ordinance commanding the preparation of a code, decreeing that it should be based on "pure reason" and the constitutional principles of the land. I do not pause to enquire into the meaning of these expressions, but when von Karmer (Kramer), the Chancellor, who, with the assistance of the eminent lawyer Suarez, took the work in hand some years later, there was no intention to eliminate the Roman law; quite the reverse. A collection of the various local customs was, however, ordered by Frederick the Great with a view of comparing and eliminating all antinomia and producing a great code compounded of all the legal elements in Prussia. The result, however, was not in accord with the ideal. The local customs, it is true, were collected but not included in the Prussian code, which, under the title of *Das allgemeines*

[1] Saleilles, *Introduction*, p. 6.

[2] See article by Dr. Schuster, xii. *Law Quarterly Review*, pp. 18, 19, 32.

[3] Saleilles, *Introduction*, etc., p. 7; and *Holtzendorff's Encyklopädie* (herausgegeben von Dr. J. Kohler), vol. i. p. 438; Gierke, *Grundzugen des deutschen Privatrechts*, § 4.

Landrecht für die Königleich Preussischen Staaten, came into force on June 1st, 1794. The local laws were not affected, and this code took the place formerly occupied by the Roman law and became the common law of the Kingdom of Prussia, being subject to modification and alteration of the unrepealed local customary law.

This code, to which Austin introduces his readers,[1] bore evident traces of the current philosophy of the natural law school, and "some modern Germanists will teach us that 'Nature-Right' often served as the protective disguise of 'repressible but ineradicable German ideas.'"[2] The Prussian Code was altered from time to time, and it was one of the most important pieces of legislative work which had to be considered when the time came for drafting the Imperial Civil Code. Rather earlier in the eighteenth century, Bavaria had enacted a code known as the *Codex Maximilianeus bavaricus civilis* (1756), which was drafted by Kreittmayer. It played, however, little part in the subsequent movement.

The next code to find a place on German soil was the *Code Napoléon*, which had been adopted in France in 1804 and introduced into the Rhine Provinces, and in a slightly modified form was translated into German for the Grand Duchy of Baden as the *Badisches Landrecht* (1809).

Two years later, in 1811, the Austrian code (*Œsterreichisches allgemeines bürgerliches Gesetzbuch*) was passed. This work owed its inception to Maria Theresa nearly a century previously. A portion of the law relating to the law of persons was codified in 1787 and is known as the Josephine Code. The Austrian code is more Roman in its principles that the Prussian, and commentaries on it were frequently cited in the German Courts. It remained in force in parts of Bavaria till 1900. Unlike the Prussian code, the Austrian repealed the local customary laws, and became the principal law of the land.

The Holy Roman Empire fell in 1806, and at the Congress of Vienna in 1814 the new Germanic Confederation was formed. A project for a code which should apply to the whole of the Confederation was in the air, and the great dispute between Thibaut and Savigny on the subject of codification was in progress.[3] Savigny's opposition to Thibaut, apart from his general objections to codification, was based on the fact that Germany was not ready for a code. Legal science, he contended, was insufficiently advanced, and the German language an unsuitable medium. He relied for improvement rather on the gradual evolution of legal ideas by *Volksrecht* and *Juristenrecht*, and he was "nervously afraid" lest the mechanical formation of law by means of *Gesetzesrecht* should impede the "beautiful processes of gradual growth."[4]

[1] *Jurisprudence*, vol. ii. pp. 674, 774.
[2] Maitland, *Political Theories of the Middle Age*, p. xv.
[3] Gierke, *Deutsches Privatrecht*, i. 22.
[4] Maitland, *Political Theories*, etc., p. xv.

Savigny failed to recognise sufficiently the power of legislation in effecting legal reforms: relying on the historical modes of growth, he neglected the possibility of a great national conscience expressing its desire for change through the medium of its legislative assembly—for codification itself may sometimes be the result of the evolution of law. Yet at the time Savigny was undoubtedly right, and the historical school which looked to him as its master was to play a great part in moulding the law in accord with the national aspirations for fuller recognition of native law. When Savigny, the great Romanist, reiterated his motto of "Back to the texts," he sought to lead men once more to the pure fount of Roman law undefiled by glossators and commentators, Italian or German. But this return to the "bed-rock of ancient classical authority" meant the re-introduction of the classical Roman law, and the world had changed since the days of Justinian. Thus the return to a closer acquaintance with the text of Justinian meant a movement of progress on the part of the Germanist school representing the modern legal requirements and legal ideas.[1]

Germany was not yet ready for a code. Thibaut had over-estimated, as Savigny had under-estimated, the worth of *Gesetzesrecht*. There was need for the growth of a real and ardent desire for a code in the popular consciousness. The psychological moment for it had not arrived. Thibaut was the typical reformer, chafing against the slow grinding of the wheels of God, irritated by the want of progress which society seemed to be making by the ordinary means of development, and desirous of a swift and speedy legal revolution whereby the wrongs of men should be at once righted. But there was a much stronger argument at the moment than any to be urged against codification as such. The Treaty of Vienna had left no place in the newly formed Federation for any central legislative organ competent to undertake such a work, and even if it had, the individual States remained for years afterwards jealously tenacious of their own separate laws. The spirit of codification was, however, working locally, and it was under its influence that Prussia entered on a reform of the Landrecht of 1794. By a curious irony, which cannot but remind us of Milton accepting the Censorship of the Press after he had written the *Areopagitica*, Savigny himself was called to undertake the task. The work, however, languished and never even reached the stage of an official draft.

In Bavaria also, where the French Civil Code, the Austrian Code, the old Maximilian Code, the Roman law, and local customary laws were all inextricably interwoven, projects and counter-projects for a code were made. In 1866 the movement had reached the stage of an official draft; beyond that it never advanced. Saxony was more successful, and after nearly twenty years of labour the Saxon Civil Code (*Sächsisches bürgerliches Gesetzbuch*) was completed in 1863.

[1] Sohm, *Institutes of Roman Law* (Ledlie's translation), pp. 160-62.

After the upheaval of 1848, the project for the new Constitution enumerated in Art. XIII., § 59, amongst the objects competent to the Federal legislature the following subjects: commercial law, bills of exchange, private law, and civil procedure.

Want of a Central Legislative Authority.—This change in the Constitution is an important landmark in the development of modern Germany. It marks the result of the national spirit which had been working since 1815, and which was in no small measure responsible for the event of 1848. But there was still no central authority capable of legislating on these matters, and each State had to be separately consulted and give in its acceptance. A code on the subject of bills of exchange had already been prepared, and finally came into force throughout the whole Confederation in 1859, when Hesse, the only outstanding State, adopted it. The Commercial Code had a similar history, and had been adopted by all the members of the Confederation, including Austria, before 1866. Thus were the commercial bonds of Empire being drawn closer and closer, and the principle accepted in one domain of legal ideas was easily capable of extension to the whole law of obligations. It will be noted when, if ever, the time comes for a code for the United Kingdom, that codes on the subject of bills of exchange and the sale of goods and merchant shipping were its forerunners.

The next department of law taken in hand was the codification of the law of obligations. The subject had been mooted during the preparation of the Commercial Code, and in 1862 a Commission representing ten States met at Dresden. Prussia was not one of the States represented. The Commission continued its work till June 13th, 1866, and on that date, at the moment of the break-up of the Confederation, the draft Code of Obligations was finished. It was never enacted, but was destined to play no inconsiderable part in the preparation of the Civil Code. The new Constitution of the North German Confederation which followed the Seven Weeks' War of 1866 marks the penultimate stage in the assertion of the hegemony of Prussia. The legislative powers of the new central organ formed by the Bundesrath and Reichstag were still of a restricted character. Previous to the outbreak of the war with France, extensions had been made, and amendments extending the legal competence of the Federal Legislature to the whole body of the civil law was under discussion when the events of 1870-71 gave birth to the modern German Empire.

The new Constitution, however, only repeated the old as regards the legislative competence of the Reichstag, and it was not until December 1873 that an amendment was carried, which, as No. 13 of Art. IV. of the Constitution, conferred full powers on the Reichstag to legislate not only for civil procedure and criminal law, but for all matters of civil law. "Ce fut," says the author of the introduction to the new French translation of the code, "le plus précieux des cadeaux de Noël qui pût être fait au peuple allemand" (p. xiv).

(iii) In considering the unifying process at work in Germany, it should be noted that the Bills of Exchange and Commercial Codes were immediately after the establishment of the Empire re-enacted as Imperial laws, and codes of civil and criminal procedure, a code organising the Courts of Germany on a uniform scheme, an Imperial Bankruptcy Law, and Imperial statutes on marriage, copyright, trade marks, patents, railways, and mining had all been passed before the Civil Code was completed in 1896.[1]

The Codification Commission.—As soon as the necessary change had been effected in the Constitution of the Empire, a Commission (*Vorkommission*) of five was appointed to settle certain preliminaries, such as the limits of the proposed code, its relation to different laws, the mode of proceedings, etc. In July of the same year (1874) the Bundesrath nominated a Commission of twelve to prepare the first draft.[2]

It will now be necessary to pass rapidly over the stages which led to the presentation of the final draft, but every step is of importance. In any similar undertaking in the future by a State possessing Parliamentary institutions, a careful study will undoubtedly be made of the way in which Germany was able so successfully to produce a draft of some 2,400 sections and obtain its passage through a representative assembly of four hundred members without any serious opposition or the inclusion of amendments destroying its harmony.

The Commission appointed in 1874 was about equally divided between judges and professors. Its President was Dr. Pape, a Privy Councillor and President of the Supreme Court of Commerce of the Empire. The work of drafting the several portions was allotted to five of the members, with the assistance of secretaries, but Dr. von Kübel, to whom the law of obligations had been assigned, died before completing his task, and the Commission therefore fell back on the abortive Dresden draft of 1866.[3] After seven years of individual labour, the Commissioners commenced to hold general meetings, and at the end of 1887—that is, thirteen years after their appointment—a Project was transmitted to the Imperial Chancellor. It was printed in 1888 together with five volumes of "Motives," containing a concise summary of the existing law and the reasons which induced the Commission to make the changes recommended. Two weaknesses characterised the Commission. Its composition was that of doctrinaries or officials, and their deliberations had been held with closed doors. They were not in touch with public opinion. The publication of the draft was greeted with the outburst of a great chorus of criticism. Criticism, it is true, was desired. Every class was called on to take an interest in this great national undertaking and give expression to its views. This request for full consideration by the nation was fully complied with, and undoubtedly ultimately assisted in the final triumph of the work. The literature produced was enormous,[4] and the Imperial Government

[1] Schuster, xii. L.Q.R. p. 25.
[2] *Denkschrift* (1896), p. ix.
[3] Saleilles, *Introduction*, p. 23.
[4] See Maas, *Bibliographie* (1899).

digested and analysed it under the various sections of the draft. The opposition to the draft was on several grounds: apparently only one critic objected on the general ground of disapproval of codification.[1] First and foremost came the objection based on the *personnel* of the Commission; the draft was doctrinaire and couched in language not to be understanded of the people.[2] Moreover, it omitted all reference to the trend of popular movements, especially those of the socialistic party. These were some of the objections of the lay critics. But the great attack on it came from the Germanist school, headed by the distinguished Professor, Dr. Gierke. This school of nationalist lawyers saw in it little but a codification of the Roman *Pandektenrecht*, and all their strength was directed towards a fuller recognition of the German customary law.

Some critics went so far as to demand an entirely new draft; but this view was unacceptable both to the general public and the Reichstag, as it was felt that to take such a step would retard the attainment of an ardently desired object and nullify the labours of the preceding twenty years.

It was, however, evident that radical changes were necessary, and in December 1890 a new Commission of twenty-two members was appointed, including all the important interests in the land, especially the commercial. Some of the members of the former Commission were retained, and in addition to the twenty-two members a certain number of auxiliary members for temporary purposes were added. Publicity was the leading characteristic of this new Commission. As each part of the draft was completed, it was published, and public criticism at once was bought to bear on it while the Commission was still sitting.

The draft of the first Commission was taken as the basis of the second, which completed the first stage of its proceedings in March 1895. May and June were spent in a thorough revision, and in October the draft was transmitted to the Bundesrath, by whom it was sent to its Committee of Justice. This Committee suppressed the Sixth Book on private international law and drafted certain provisions on the subject, which were relegated to the Introductory Law. Early in January 1896 the work of the Committee of Justice was completed and the draft Code and a draft Introductory Law were laid on the table of the Reichstag, accompanied by an official Memorandum containing important and valuable statements of the reasons for the various changes (*Denkschrift zum Entwurf eines bürgerlischen Gesetzbuchs*).

The Draft Code in the Reichstag.—The matter had now reached the final and critical stage, and all the care that skilful politicians could exercise, all the devices of the old Parliamentary hands, were necessary to harmonise the conflicting interests of parties and save the code from being wrecked. The Government was determined to get the code through before

[1] Schuster, xii. L.Q.R. p. 30.

[2] See Prof. Felix Dahn in *Juridical Review*, vol. ii. p. 15.

the end of the Session. Parliamentary procedure in Germany, including the indispensable and sacred three readings, is on lines similar to those of the British Parliament. The rights of private members to move amendments is equally unlimited. The patriotism of the members of the Reichstag was equal to the strain, and an agreement was arrived at whereby the draft was to be submitted to a Committee of twenty-one members containing representatives of all the important political parties, which it will be remembered are far more numerous and less homogeneous than in this country. This Committee commenced its work in February 1896, and held fifty-three meetings, the last being on June 11th. Next day it presented its report, and on the 19th the House commenced the debate on the second reading.[1]

There was still some dissatisfaction. The Socialists contended that their point of view was still almost overlooked, though the draft went farther in the direction of Socialism than previous legislation; the Germanists were not satisfied, though numerous changes had been made in the draft in favour of their views; the Catholic party was inclined to raise difficulties over the sections on civil marriage, which had been compulsory since 1875; the Junker party objected to certain changes in the land laws.

The debates lasted until July 1st, and the whole of the discussion was characterised by the dignity and patriotism which had prevailed throughout the whole course of the deliberation. Only one amendment was carried which at all interfered with the general principle—viz., the substitution of the age of twenty-one for twenty-five as that at which persons could marry without parental consent. The chief matters on which discussion took place were: (*a*) Interdiction of persons on account of drunkenness whereby their families were exposed to poverty (Art. 6); (*b*) the legal personality of associations (Art. 21); (*c*) the nullifying of acts done contrary to law or good morals (Art. 307); (*d*) the liability for damage caused by animals (Art. 833) (this section imposes an absolute liability, and, excluding the question of *contra naturam sui generis* and *noxa caput sequitur*, follows the *Code Napoléon*); (*e*) damage caused by game (Art. 835) (this was the longest discussion of any: no less than thirty speakers taking part in the debate); (*f*) civil marriage (Art. 1303); (*g*) age of consent for marriage (Art. 1569); (*h*) divorce for insanity (Art. 1569) (divorce is allowed where the lunacy has continued for three years and is incurable); (*i*) the parental powers (Arts. 1589 and following); (*j*) olograph wills (Art. 2231).[2] The greater part of the articles were voted *en bloc*, the second reading took place on June 27th, and on July 1st the Bill was passed by two hundred and twenty-two to forty-eight, there being only eighteen abstentions. The Bundesrath adopted the Code on July 4th, and on August 18th, 1896, it received the Imperial sanction. It came into force on January 1st, 1900, as *Das bürgerliches*

[1] Saleilles, *Introduction*, p. 35.

[2] O. de Meulenaere, *Code civil allemand*, Introduction, p. vi.

Gesetzbuch für das Deutsche Reich, together with an Introductory Law, laws on judicial organisation, civil procedure, and land registration.

Multiplicity of Local Laws.—The complexity of the legal situation in Germany at the moment of the passing of the code has to some extent been already explained, but in order to emphasise the difficulties overcome it may be well to give more particulars on the territorial distribution of the various laws. An appendix to the *Denkschrift* to the second draft provides the material.[1]

(*a*) In the centre of the Empire lies the country wherein the "common law" prevailed. Bounded on the south by the Black Forest and Bohemia, and on the north by the rivers Weser and Elbe, and containing a population of 16,500,000, this territory was governed by the Roman law "received" in 1495, as modified by judicial decisions and supplemented by innumerable ancient customs of districts and towns, by privileges and statutes. In twenty-three governmental divisions the Roman law was modified by thirty special laws and customs, some of them reduced to writing as early as 1240, others codified as recently as 1787.

(*b*) In Saxony, with a population of 3,500,000, the Saxon Civil Code of 1863 was law.

(*c*) In Prussia, containing ten governmental divisions, and portions of Bavaria and Saxe-Weimar, containing a total population of 21,200,000, the Prussian Landrecht of 1794 was law, subject however to modification by no less than sixteen local laws (*Provinzialrecht*).

(*d*) In the Rhine Provinces either the purely French *Code Civil* of 1804 or the modified form in the Baden Landrecht was law for populations respectively of 6,700,000 and 1,700,000.

(*e*) In the Province of Schleswig-Holstein, containing a population of 15,000, the Danish law of Christian V. published in 1683 was law.

(*f*) A small district of Bavaria containing only 2,500 persons was under the Austrian Code of 1811.

These laws were in divers languages—Latin, Greek, French, Danish, and German; thus nearly half the Empire was subject to laws written in a non German tongue.

But any one of these systems, as will have been noticed, was liable to modification or contradiction by local laws and customs. Two districts adjacent and forming part of the same political unit might be subject to different laws of succession, and even in the same town two different laws might apply to different parts, one law holding good for the suburbs, another for the old town, which had formerly been a walled town with privileges. In the same town also there might be different laws for different classes of persons.

(iv) The effect of the change of the Constitution in 1873, making the passing of the code possible, resulted in the abnegation by the various

[1] See also Meulenaere, p. ii. Sohm, *Institutes*, etc., p. 6.

kingdoms and principalities forming the German Empire of their undoubted right to self-government and legislation, and the vesting of full powers in the Imperial Legislature. This is brought out in a striking manner in the Introductory Law. Art. 55 provides that the provisions of private law in the Federal States are abrogated, except where otherwise provided by the code or that law. This article is of far-reaching application and has an important constitutional bearing. It repeals the past legislation of the States which was within their competence, and at the same time limits their legislative capacity for the future, even in those matters which under the Constitution of 1871 were left to them. The acceptance of the Introductory Law and this article was essential to the working of the Code, and here again one of the greatest political stumbling blocks was safely overcome by the same patriotism which had carried through the draft.

The Value of Ideals.—The German code is, in fact, a striking illustration of the effect of idealism in politics. It was rendered possible only by the passionate devotion to a great ideal which permeated all the masses of the Empire, who had passed *a* code long before *the* code received the official sanction of the Imperial Legislature. The making of the code is a standing object-lesson to all States that are looking forward in the future to a scheme of codification, and the Germans may well be proud of the labours which for twenty-two years were devoted to its consideration. *Finis opus coronat*, and the end was the production of "the most carefully considered statement of a nation's laws that the world has ever seen."[1]

[1] Maitland, *Political Theories*, etc., p. xvii.

TO WHAT EXTENT SHOULD JUDICIAL ACTION BY COURTS OF A FOREIGN NATION BE RECOGNISED?

[*An address delivered by the* HON. MR. JUSTICE KENNEDY *at the recent St. Louis Congress.*]

"WOULD not an international union for the execution of foreign judgments," asks M. Charles Constant,[1] "practically be the last word of the science of the law of nations, crowning, so to speak, the efforts of jurists towards the attainment of the unity of judicial principles?" Without placing such a union on quite so high a pedestal, one may, I think, fairly claim that the subject upon which I have had the honour of being invited to speak is one of very real importance to the family of civilised nations. Let me hope that the difficulty and the virtue of the theme will breed in your minds a kindly tolerance for the imperfections of its treatment. You will remember that my judicial duty is a jealous mistress, and, also, that mere regard for your patience must compel me altogether to pass by some points, and give brief notice to others, on which otherwise I should have felt myself bound to dwell.

Progress towards Unification.—The complete unification of laws is as far beyond the range of practical possibility as the universal adoption of a common language, or a poet's dream of the "Parliament of man, the federation of the world." There are not wanting, however, signs of augury that ere long in respect, at any rate, of laws and State regulations which affect mercantile and maritime interests, an advance towards practical unification in particular directions, such as the law relating to collisions at sea and marine insurance, may be made, and thus some visible fruit reward the good work of the International Law Association and its fellow-labourers in the same field. Indeed, when one considers the wonderful increase during the last sixty years both in the wish and in the effort of civilised mankind for a better understanding between its component parts, it seems rather strange that in the sphere of private international law more has not been accomplished towards evolving order out of chaos. Steam and electricity and the power of the press have, as it were, drawn together the ends of the earth. Swift inter-communication, the facility of frequent personal intercourse, and the

[1] Introduction to his work *De l'execution des Jugements etrangers*, Paris, 1890.

ceaseless interweaving everywhere of the diverse and tenacious threads of commercial enterprise, have taught the workers of the Western world, not merely the error of much of their old unreasoning and indiscriminating mistrust of all foreign institutions, but its costliness. They have come to see the gain, both direct and indirect, moral and material, which would ensue, if the machinery of those foreign institutions and of their own could be brought into smoother and more harmonious co-operation.

Execution of Foreign Judgments.—In these circumstances, it is only natural that for many years past the matter of the execution of foreign judgments should have been more and more discussed alike by men of business and by students and professors of private international law. Nor only by them; for the question of the recognition by the State of foreign judicial acts is of great general concern to its subjects. I may, I think, properly pause here to notice, in passing, that some part at least of the difficulties which, in spite of many favourable influences, retard a universal recognition of foreign judicial proceedings, especially in regard to questions of marriage and divorce, has arisen during the last century from the introduction into European politics, as Mr. Westlake puts it, of a new factor, nationality, and from the tendency of continental States, and especially of France and Italy, to refer to nationality, and not, as jurists formerly did and as most English lawyers, at all events, still do, to domicile, the determination of the personal law and jurisdiction. The intrusion of a new criterion has added to complications which were already sufficiently perplexing. But it has found considerable support.

In what spirit, then, should this question of the treatment of foreign judgments be approached? In the spirit, I submit, of the utmost possible liberality. There is nothing either profitable or patriotic in national pharisaism. Nor would it stand upon any solid ground. The more one studies the matter, the more satisfied one becomes that there are few canons in the domain of international jurisprudence for which the distinctive title of orthodoxy can confidently be claimed. On points of importance, after consulting the authorities, professional and judicial, one can sometimes only sigh, *Quot doctores, tot sententiæ!* Each member of the family of States, mindful of the extent to which equality of civilisation, identity of moral standard, and community of ideas as to legality, exist throughout Western Christendom, should generally presume that right has been done in the judicial proceedings of a sister State. Let us be ready to admit that in regard to the application of legal principles there may be, not infrequently, alike in point of abstract reasoning and in point of practical advantage, something to justify a foreign practice which is not our own practice. Provided always that the litigant parties have been judged by a foreign tribunal of competent international jurisdiction, the fact that it has applied a legal principle to which we should have preferred another (as, *e.g.*, the *lex loci contractus* and not the *lex loci solutionis*) ought generally, and in regard to

what may be called ordinary matters of litigation, to be regarded as of slight concern in comparison with the establishment of the principle that a judgment anywhere is a judgment everywhere. We in England and in America, the fortunate inheritors of the common law, may be greatly right in preferring our system of law and of legal administration to the system which, under somewhat varying forms, dominates continental Europe. I have no doubt that there is a reciprocity of feeling on the other side. But, nowadays, so universal is the respect and the desire for justice, so rarely is its administration impure, and so great the gain of the extra-territorial recognition of judicial decrees, that the application of the *comitas gentium*, from which such recognition proceeds, may, I hope, safely receive extension. I am glad to believe, judging from the past, that my own country will not stand back in this matter. "No country," wrote Sir Robert Phillimore in his great work on International Law (3rd ed., vol. iv., p. 764), "has been more liberal than England in giving effect to the decisions of foreign Courts. This will be found the just conclusion from the decisions which have taken place in the British Courts, from the time of the decision of *Weir's* case in the reign of James I. to the decisions in *Vallée* v. *Dumergue* in the English Court of Exchequer in the year 1849, and *Barber* v. *Lamb* in the Court of Common Pleas in 1860, and since." The same praise had been bestowed before by Chief Justice Marshall (cited by Story, *Conflict of Laws*, § 590), in his judgment in *Rose* v. *Hinsley* (4 Cranch 270), where he speaks of the decisions of the Courts of England "as giving, in his belief, to foreign sentences, as full effect as is given to them in any part of the civilised world." A like encomium would, I doubt not, be found due to the United States and, in Europe, pre-eminently to Italy.

A general principle upon which all States ought to proceed in the treatment of foreign judgments has been enunciated by Vattel and approved by Story.[1] "It is the province of every sovereignty to administer justice in all places within its own territory and under its own jurisdiction, and to take cognisance of the controversies which arise within it. Other nations ought to respect this right; and, as the administration of justice necessarily requires that every definitive sentence regularly pronounced be esteemed just, and executed as such, when once a cause in which foreigners are interested has been decided in form, the sovereign of the defendants ought not to hear their complaints. The decision made by the judge of the place, within the extent of his authority, ought to be respected and to take effect even in foreign countries." If we accept this general principle, we must, at the same time, admit that at present it cannot be applied to every class of case, and cannot be applied without some reservation to any; and, further, that as to the proper conditions and limitations great difference of opinion exists. The question is, How far might national action properly go in the direction of recognition?

The Limits of Recognition.—And here, by way of preface to the more

[1] *Conflict of Laws*, § 585.

particular examination of this question, I desire to make two observations of a general nature. First, we must carefully keep in view the basis of the jurisdiction of Courts of justice in all countries. Nowhere, so far as I am aware, has that basis been better or more concisely set forth than in the judgment of the Privy Council delivered by Lord Selborne in the case of *Sirdar Singh* v. *Faridkote* (1894 A.C. 670): "All jurisdiction is properly territorial and *extra territorium jus dicenti impune non paretur*. Territorial jurisdiction attaches (with special exceptions) upon all persons, either permanently or temporarily resident within the territory, while they are within it, but it does not follow them after they have withdrawn from it, and when they are living in another independent country. It exists always as to land within the territory, and it may be exercised over movables within the territory; and in questions of status or succession governed by domicile, it may exist as to persons domiciled, or who, when living, were domiciled, within the territory. As between provinces under one sovereignty, the legislation of the sovereign may distribute and regulate jurisdiction; but no territorial legislation can give jurisdiction which any foreign Court ought to recognise against foreigners who owe no allegiance or obedience to the power which legislates." Secondly, it is clear, I think, that special considerations arise according to the nature of the subject to which the judicial action in the foreign country relates. A judgment *in personam* which settles a claim of debt or for damages in contract or in tort; a judgment *in rem*, which makes a disposition of movable property by vesting the property in some person or persons as against all the world or by decreeing a sale of it in satisfaction of a money demand which it has adjudged to have constituted a lien on the property itself; and a judgment establishing or affecting status, such as one which declares the legitimacy of a child or grants a divorce, are not susceptible of identical treatment. And in considering the effect which ought to be given to a judicial declaration of bankruptcy by a foreign Court, one has carefully to keep in view the difficult duty of providing for the equitable adjustment *inter se* of the claims of creditors whose rights against the bankrupt may have arisen under different jurisdictions, and subject to different laws in respect of the legal incidents which attach to their contractual relations with him.

Judgments "in Personam."—Let us consider first the recognition of foreign judgments *in personam*. On what conditions and under what limitations should they be enforceable? Be it understood that when I use the word "enforceable," I do not refer to a particular method of enforcing them. I intend to include alike that which is the English and American method of procedure, *i.e.* by an ordinary action in which the claim is based upon the foreign judgment; and the method of procedure as I understand it to exist in Italy, where effect is given to claims under foreign judgments by an extraordinary procedure—"instance en delibation" (*giudizio di delibazione*) whereunder a "tribunal d'exequatur," after examination of the

foreign judgment on certain specified points, rejects or adopts it, and if it adopts the judgment, admits it, like a domestic judgment, to execution within the jurisdiction.

I suggest that a foreign judgment *in personam* should be held valid, and, unless already satisfied, have the effect of a conclusive determination given to it and be enforceable in the Courts of any State as against the unsuccessful party, and persons who through that party are privy to it, provided that it appears to the Court which is asked to give effect to it that—

(*a*) It has been pronounced by a Court of competent jurisdiction.

(*b*) It is final, or as continental jurists term it, executory, in the country in which it was pronounced.

(*c*) It does not decree anything, and does not give effect to a claim which itself is, contrary to the public policy or to the law of the country in which it is sought to enforce it.

Provided, always, that the tribunal before which the question of the enforcement is raised should treat the judgment as invalid if it is shown to have been obtained by fraud.

I hope that to some extent, at least, these suggestions, which represent, in my opinion, the irreducible minimum of necessary conditions, explain themselves. I feel, however, that I ought to add a few words: chiefly, and in the first place, as to what might otherwise be deemed unintentional omissions.

Ought the Court from which enforcement is sought also to require proof that the parties were duly cited, and, if it was a judgment by default, that the party against whom it was pronounced had been made aware of the action and had the opportunity of defending himself?

I have not suggested such a condition, because in the first place, so far as regards the due observance by the foreign Court of its own prescribed procedure, we should apply, I am inclined to think, the maxim, *Omnia præsumuntur rite esse acta*, and not allow the contrary to be alleged except as an element in a defence of fraud in the obtaining of the judgment; and, in the second place, because the only objections on the plea that the prescribed procedure was itself improper (or, as the point has sometimes been put, "inconsistent with natural justice,") which ought, in my humble judgment, to be entertained, will be found really to be objections to the international competence of the tribunal. It is beyond controversy that, in the absence of an international agreement as to rules of competence, it is right and also consistent with the comity of nations that the Court which is asked to give effect to a foreign judgment should satisfy itself that the tribunal which gave the judgment belonged to a country whose sovereign —in the language of Mr. Dicey [1]—might, in accordance with the principles maintained by the Court which is asked to enforce the judgment, rightly adjudicate upon the matter in which the judgment was given. It is, I am

[1] *Conflict of Laws*, pp. 35, 36.

afraid, equally beyond controversy that the principles which are maintained by Courts of law as to international competence of jurisdiction are not everywhere the same. I believe that an American Court would concur with the judges of our Court of Queen's Bench[1] in the opinion that it would not be right to treat as internationally competent a *forum actoris*, such, *e.g.*, as has been created in France by Art. 14 of the Code Napoléon; whereby a Frenchman, as against a non-resident foreigner, has been given a jurisdiction neither personal to the defendant nor connected with the obligation, but personal to the plaintiff.[2] The same would be true, I suppose, as to the claim advanced by the Courts of some communities, and especially of Scotland, to ground jurisdiction in an action *in personam* on the mere fact of the possession by the defendant of property lying within the limits of the country to which the Courts belong.[3] Nothing except an International Convention can create a uniform criterion of the competence of the jurisdiction of the adjudging tribunal. Assume, however, that in the particular case no question of want of jurisdiction can be raised; that the party against whom judgment has passed in the foreign country is held by the Court of the country where enforcement is sought rightly to have been treated by the foreign tribunal, in regard to the claim against him, as subject, by domicile or by allegiance or otherwise, to the foreign jurisdiction, must he not clearly be held bound by the ordinances of the law which that foreign tribunal administers in regard to citation and all other matters of legal procedure? Is it altogether reasonable that, when sued abroad upon the judgment which has been regularly obtained against him in conformity with that law, he should be allowed to find a defence in the opinion of the Court of the country where he is sued that the law as to procedure in the country of the judgment ought to have been other than it is? Look at the matter from another point of view. There is no recognised standard of 'morality' or 'natural justice' in regard to legal procedure; we are dealing with acts not of barbarous or uncivilised, but of equally civilised nations. If we agree that it is desirable that foreign judgments *in personam* should be recognised, ought we not to assume, not merely that the rules of legal procedure prescribed by the laws of the adjudging State have been duly observed by its Court before judgment has been pronounced, but also that these rules themselves—although not, perhaps, in accordance with our own notions—do not constitute a violation of morality or natural justice?[4]

As to my inclusion of a condition that a party sued on a foreign judgment shall be permitted to resist the claim on the ground of fraud, let me say that I should have been glad if I could have submitted, for your consideration, some compromise between the English law, which is also, I

[1] See *Schibsby* v. *Westenholtz*, L.R. 6 Q.B. 155.
[2] Westlake, p. 347.
[3] Dicey, *Conflict of Laws*, p. 380.
[4] Cf. Piggott on Foreign Judgments, p. 171.

believe, the law generally maintained in the United States, and the opposing view which is entertained, as I know, in the legal world upon the Continent of Europe. It is settled law with us that the defendant may show that the foreign judgment was obtained by fraud, and, if it be necessary for that purpose, may have questions retried which were adjudicated upon by the foreign Court. The continental jurist objects to this. He contends—as M. Octave Marais, a distinguished French lawyer, put the point at the Rouen Conference of the International Law Association in 1890—"cette question devrait être agitée devant le juge du pays qui a rendu le jugement." It was suggested at the same conference by Mr. Foote, a well-known authority on international law, in his draft Foreign Judgments convention, that besides alleging and proving that the judgment was obtained by fraud, the party sued must, in order to make out a complete defence, further show that he had no means or opportunity of setting aside the judgment or obtaining other sufficient relief, on such ground, in the country of the judgment.

There is, I think, so much that may fairly be urged, at all events, in support of the continental opinion that the defendant should be left to apply for an amendment or reversal of the judgment to the tribunal which gave it, that I am inclined to think that the compromise of the contending views, on the lines suggested by Mr. Foote, ought to receive careful consideration, if a convention between States could be arranged which should also settle and codify rules as to competence of jurisdiction. Without such a convention, and except as part of such a convention, I could not, myself, recommend any modification of the English position. I feel too strongly the goodness of the point put at the same Conference by Mr. Cephas Brainerd of New York: "Where I serve a process upon a person passing through the State of New York, a Frenchman if you please, which is the most helpless case, and I obtain final judgment by fraudulent conduct, he ought not to be called upon to come from France to the State of New York to litigate the question of fraud, but he ought to have the option and right to wait until I attempt to enforce the fraudulent judgment against him in the country of his residence—namely, in France; and then he ought to have the opportunity to test the question whether he had been honestly or fraudulently treated in the Courts of my State."[1]

"Exceptio Rei Judicatæ."—So far I have been dealing with a foreign judgment *in personam* as a judgment which the successful party is seeking actively to enforce. But the judgment may have been in favour of the defendant. If it was, and the plaintiff afterwards proceeds against the defendant elsewhere upon the same cause of action, the foreign judgment should be recognised, as it is recognised in England, as affording the defendant a conclusive answer to the claim. In the language of Eyre C.J. in *Phillips* v. *Hunter*[2]: "It is in one way only that the sentence or judgment

[1] Report of the nineteenth Conference held at Rouen, 1900, pp. 225, 226.

[2] 2 H. Bl. 402.

of a foreign Court is examinable here—that is, when the party who claims the benefit of it applies to our Courts to enforce it and thus voluntarily submits it to our jurisdiction. In all other cases, we give entire faith and credit to the sentences of foreign Courts and consider them conclusive upon us." And so Story[1]: "It is *res judicata* which ought to be received as conclusive evidence of right, and the *exceptio rei judicatæ* under such circumstances is entitled to universal conclusiveness and respect." Clearly the plaintiff, who has himself invoked the action of the foreign Court, must not be allowed to impeach its jurisdiction. At the same time I would venture, although it is generally held otherwise, to suggest that, if a defendant in proceedings against him on a foreign judgment may defeat the claim by proving that the judgment was obtained by fraud, it would be equitable that, if the plaintiff is met by the *exceptio rei judicatæ*, he should be allowed a reply upon the same ground of fraud. Subject to this, and upon the assumption (1) that the foreign judgment appears or is shown to have been a judgment on the merits, and not founded on a statute of limitations peculiar to the *lex fori*, and (2) that the claim in the actions in the two Courts and the character in which the plaintiff has sued in both are the same, the foreign judgment should be recognised by the Court in which the second action is brought as a conclusive answer to the plaintiff's demand.

Before passing on to the consideration of judgments *in rem*, I think it may be useful to some who are here and are interested in the question of the enforcement of foreign judgments *in personam* if I call to their notice the very valuable papers, discussions, and draft conventions which they will find in the Reports of the Conferences of the International Law Association held at Milan in 1883, at Brussels in 1885, at Rouen in 1900, and at Antwerp in 1903. Especially interesting is the report which was presented to the last named Conference by M. Gaston de Laval of Brussels, Counsel to the British Legation there. It contains a draft "projet de convention" between Great Britain and Belgium, which is prefaced by noteworthy comments of the author upon the subject of the execution of foreign judgments and the possibility of such an international convention. He calls attention to a difficulty of a minor but still troublesome kind, which might easily be overlooked, but which, according to the author, unless it were removed by the Convention, would raise an obstacle to the execution of some English judgments in Belgium. By the Belgian Constitution, Art. 97, "Tout jugement est motivé. Il est prononcé en audience publique." If a Belgian Court gave effect to a foreign judgment which did not set forth in writing the grounds on which it is founded and was not also pronounced in public, there would result, in the view of M. de Laval, a violation of the Belgian Constitution. A judgment given by an English judge in chambers, or pronounced in court upon the general verdict of a jury, without special findings, as is usual in the

[1] *Conflict of Laws*, § 598.

case of ordinary money claims, would not satisfy these conditions. We are apt to forget that trial by jury in civil cases is not an institution of the procedure in France or in other parts of continental Europe.

Judgments "in Rem."—A judgment *in rem* should be held, as I believe it is generally treated now, to be conclusive everywhere, provided always that it has been pronounced by a Court of competent jurisdiction and is not shown to have been obtained by fraud. By the term "judgment *in rem*" I mean a judgment as defined by Cockburn C.J. in *Castrique* v. *Imrie*,[1] determining "the status of a chattel with reference to property, or vesting the property at once in the claimant, as a condemnation of the Court of Exchequer in a revenue case vests the property in the Crown, or the sentence of the Court of Admiralty in a matter of prize vests the property in the captor." Such a judgment, in regard to its claim for recognition elsewhere, stands even in a stronger position than a judgment *in personam*. The thing duly adjudicated upon and disposed of by the judgment, if it be a movable, is within the jurisdiction of the Court. It is in an analogous position to land or other immovable property, as to which, says Story (§ 590), the judgment pronounced in the *forum rei sitæ* is held to be of universal obligation as to the matters of right and title which it professes to decide in relation thereto. According to the law of England, in the language of Mr. Foote, in his work on Private International Jurisprudence, in the absence of fraud, for which a foreign judgment *in rem* may be impeached just as a foreign judgment *in personam* may be impeached for the same cause, the only requisite necessary to the validity and conclusiveness of a foreign judgment *in rem* is that it should have been pronounced by a competent Court [*i.e.*, a Court possessing international competence] having actual jurisdiction over the subject-matter. It is conclusive in all Courts, and not only as a judgment *in personam* between the same parties or privies, but against all persons; and not only in regard to the fact or facts directly adjudicated upon, but in regard to all facts upon which the judgment of the Court is necessarily founded. The recognition which my country accords to foreign judgments *in rem* should be accorded to such judgments everywhere.

Judgments affecting Status, Marriage, and Divorce.—I now approach the questions, and very thorny questions they are, which present themselves for solution, if an attempt is made to systematise the recognition of foreign judgments affecting the status of persons. Some of such judgments touch to the quick the most sacred and intimate relations of social life; and the claim for anything beyond territorial recognition has to fight its way through a jostling crowd of jealous susceptibilities. Foremost, no doubt, in public interest, is the question of the recognition of the foreign judicial proceedings which relate to marriage and divorce. "Marriage," said Lord Westbury in the House of Lords in the case of *Shaw* v. *Gould*,[2] "is the very foundation of civil society." True. True also that up to a

[1] 8 C.B. N.S. pp. 411, 412.

[2] L.R. 3 H.L. at p. 32.

point certain ideas in regard to the law of marriage are common to all parts of Christendom. "It is agreed that the essentials are that the parties should not be within prohibited degrees of kinship, that each should have sufficient age, sufficient intelligence, freedom of will, intention to contract marriage, and to contract it with a particular partner, and that there should be some overt act or sign evidencing the marriage." But, as Mr. Justice Phillimore, the distinguished author of this statement, proceeds to point out, we have here reached the limit of agreement. As to the prohibited degrees of kinship, as to the age which should constitute capacity, as to the requirement of consent, or of absence of dissent, on the part of parent or guardian, exist divergencies which race, religion, and nationality have combined to create and to maintain. In the countries where divorce is permitted, the circumstances necessary to justify divorce are not everywhere the same. Radically different views have been expressed by eminent judges and eminent jurists as to the legal principles which ought, according to international law, to be applied in determining the validity of marriages and of divorces. Is consent to the marriage on the part of parent or guardian an essential, or only a matter of form and ceremony? Is the *lex loci celebrationis* to be the criterion of the validity of the marriage only in matters of form and ceremony or as to essentials also? Is the question of personal capacity or competence to contract to be determined by the law of the domicile or by the law of nationality? Ought the *lex loci* also to be complied with in these respects? Ought the incapacity of one only of the parties to be held sufficient to justify a decree of annulment? And, in regard to the dissolution of marriage by a sentence of divorce, what circumstances are necessary or sufficient to create competence in the Court of a country which was not the *locus celebrationis*? In the face of the apparently irreconcilable differences in the answers which competent lawyers are found to give to these vital questions, and of the importance which all nations attach to the support of their own marriage laws, it would be, in my judgment, futile at the present time to try to formulate terms or limitations subject to which nations should agree to recognise as conclusive the judgments of foreign Courts as to marriage and divorce. We must first reach a condition of greater harmony, or perhaps I ought to say of less discord, as to the legal principles to be applied. The prospect of improvement in this direction is not good. The view of Mr. Westlake is thus expressed at the close of his well-known work on Private International Law (p. 373): "A unity as to marriage and divorce is as important as any topic I have mentioned, but there we touch the point in which modern civilisation has during three centuries been receding from unity, and perhaps will not rejoin it without first passing through even greater diversity." In an earlier part of this paper I ventured to say that in regard to ordinary actions *in personam*, in contract or in tort, we ought not to hesitate, if we may thereby attain even to an approach towards the universal recognition of judicial proceedings in

such actions, to incur the risk of thereby sanctioning sometimes, in effect, by the enforcement of a foreign judgment, an adjudication which has proceeded on, or has been affected by, the application of one principle of law where our own Courts would have preferred another. But marriage cannot properly be treated as a contract and nothing more. "In truth," Sir James Hannen has said, "very many and serious difficulties arise if marriage be regarded only in the light of a contract. It is indeed based upon the contract of the parties, but it is a status arising out of a contract to which each country is entitled to attach its own conditions, both as to its creation and duration." The only suggestions I can offer to the Congress are suggestions of a restrictive character.

Suggestions: Decrees as to Validity of Marriage.—First: That a Court should not be held bound to recognise as valid a foreign decree of nullity of marriage on the ground of incapacity or prohibition except (perhaps) where the Court which pronounced the decree was a Court of the territory wherein the marriage was celebrated.[1] Obviously it is there that the validity or invalidity of the marriage should be investigated. In 1860, in the case of *Simonin* v. *Mallac*,[2] the English Court rightly, if I may humbly say so, exercised jurisdiction to enquire into the validity of a marriage celebrated in England, and rejected a claim for a declaration of nullity, although such a decree had been given in France, which had always been the country of the domicile of the parties.

—— **Decrees of Dissolution.**—Secondly: A Court which is not the Court of the country of the matrimonial domicile at the time when divorce proceedings are instituted should not be recognised elsewhere as a Court competent to pronounce a decree of divorce (judicial separation and alimony stand on a different footing), except in favour of a wife who has been deserted by her husband, or whose husband has so conducted himself that she is justified in living apart from him, and who, up to the time when she was so deserted, or began to be so justified in living apart from him, was domiciled with her husband in that country. By domicile I do not mean mere residence or sojourn; I mean, according to the definition given by Sir Robert Phillimore, "residence at a particular place, accompanied with positive or presumptive proof of an intention to remain there for an unlimited time."

As to the propriety and the importance of this restriction, an Engish judge (Lord Penzance) of great eminence and of great experience in questions of marriage law has placed on record this weighty opinion: "It is the strong inclination of my own opinion that the only fair and satisfactory rule to adopt in this matter of jurisdiction is to insist upon the parties in all cases referring their matrimonial differences to the Courts of the country in which they are domiciled. Different communities have different views and laws respecting

[1] [I have here and in a few other places slightly altered the text of the address, by addition or alteration in order more accurately or fully to express my intended meaning.—W.R.K.]

[2] 29 L.J. P. & M. 97.

matrimonial obligations and a different estimate of the causes which should justify divorce. It is both just and reasonable, therefore, that the differences of married people should be adjusted in accordance with the laws of the community to which they belong, and dealt with by the tribunals which alone can administer those laws. An honest adherence to this principle, moreover, will preclude the scandal which arises when a man and a woman are held to be man and wife in one country and strangers in another."

A decree of dissolution pronounced by a Court which is not the *forum domicilii* (subject to the limited exception in favour of a wife which I have stated), unless, perhaps, it were shown that the respondent had by unconditional appearance voluntarily submitted to the jurisdiction, should be refused recognition in all other countries. The law of England is now, I think, definitively settled in this sense. With the sincere respect which is due to the different views of its authors, I cannot help expressing my regret in regard to such legislation as seems to have been in force in the State of Pennsylvania in 1892, whereby, as appears from the reported English case of *Green* v. *Green & Sedgwick* (1893 P.D. 89), tried before Mr. Justice Gorell Barnes in 1893, it was made possible for a married woman, if only she had formerly been a citizen of that State, on showing, in her petition, that she had been obliged by her husband's misconduct to leave his habitation or domicile, to obtain from the Court of that State a decree of dissolution of marriage. Jurisdiction is thus held to be well founded on former citizenship alone. The place of the celebration of the marriage and of the matrimonial domicile may have been elsewhere. Even matrimonial residence within the jurisdiction of the State may never have existed. Perhaps the Pennsylvanian legislation has since been modified or repealed. I hope—although I confess I have been surprised by the reports which from time to time I have read of the treatment of divorce by the legislation and in the Courts of some other States—that it has not been imitated.

Administrators.—In regard to the recognition of an administrator appointed by a foreign Court to administer the personal estate of a deceased person in the case of intestacy, and the title of an executor which has been established by a foreign grant of probate, the propriety of universal recognition, in accordance with the comity of nations, is, I think, generally admitted. The administrator or executor does not, indeed, by the mere virtue of the proceeding in the foreign Court, acquire a status outside its territorial jurisdiction; but by the comity of nations the Courts of the country in which there is property of the estate of which the administrator or executor seeks possession will generally follow the appointment or the grant of the foreign Court, and act, as it has been judicially expressed, as auxiliary to the foreign Court. I have used the phrase "will generally follow" because it is not reasonable that it should be absolutely bound in every case to validate the appointment of the nominee of the foreign Court or grant

probate, as auxiliary to the foreign Court. There might be a case where the appointment or the grant would be a proceeding contrary to the law of its own country. Except in such possible, but, no doubt, very exceptional circumstances, an executor or administrator who comes with the proper authority of the foreign Court will be clothed in the manner prescribed by the law of the *forum* in which he seeks recognition, with authority, as the representative of the estate of the deceased, to deal with assets within the jurisdiction of that *forum* and to sue in respect of the deceased's *choses in action*. Of course, as he draws his authority from the local *forum*, in regard to the exercise of powers within its jurisdiction, he will rightly be held in respect of such exercise bound to conform to its laws in all matters of procedure.

Infants: Capacity and Guardianship.—In regard to curators and guardians, having regard to the differences of opinion and of legal rule which exist as to the age of full capacity, and as to the nature and extent of the control which the law should entrust to the discretion of one who stands towards another *in loco parentis*, I do not think it reasonable to suggest that a State should, in all cases, be bound, without any reservation of the right of independent enquiry and decision, to recognise, in the sense of enforcing, such rights as the Courts of a foreign State should think proper to confer upon a person when it appoints him guardian or curator of another. More than one reported case has shown that an English Court, if the welfare of an infant who is the subject of a foreign State is brought before it for consideration, will, whilst not surrendering its own discretionary power, pay great respect to the wishes of the guardian appointed by the foreign Court, and this degree of recognition is all, I think, that can be reasonably looked for. Disabilities of a penal character must be held to operate only within the jurisdiction of the State whose laws impose them. And so an English Court has refused to recognise the incapacity which a French adjudication had attached to a reckless spendthrift (*prodigue*) who was not an infant, and has rejected the claim advanced by his *conseil judiciaire* to interfere with his receipt of money due to him according to the law of England.

Lunacy.—The curator or committee of a lunatic acting under a foreign declaration of lunacy stands, in regard to the claim for recognition, abroad, in a different position. Lunacy is universally recognised as a thing which justifies, and indeed requires, the appointment of a representative protector. *Prima facie*, the committee of a lunatic appointed by the proper Court of the residence of the lunatic should be treated as a person rightly clothed with the powers which the foreign appointment has purported to give him. But even in this matter, the Court of another State should, I think, retain the privilege of enquiring, upon good cause shown, into the question of the sanity or insanity of the alleged lunatic, if the representative appointed by the foreign State asks its sanction in order to enforce within the jurisdiction of the other State rights derived from the lunatic, or in order to deal with property of the lunatic.

Bankruptcy.—In regard to a bankrupt's representative, whether designated as assignee or trustee, every one should desire, wherever there are movable assets of the foreign bankrupt, that there should be complete recognition of the title of the person appointed by the Court of the country of the bankrupt's domicile, as the person in whom (according to the legal effect of the appointment) the bankrupt's estate is vested, or to whom, for the benefit of creditors, the administration of that estate has been entrusted by that Court. The degree of such recognition which is accorded by States at present is varied and unequal. Germany, for example, appears to give to the foreign assignee the right to get in assets of the estate in Germany, if by diligence he can anticipate the action of German creditors in obtaining execution, but the fact of his appointment by a foreign Court does not hinder or invalidate such action on their part. In Belgium, according to the statement of Mr. A. F. Topham in an interesting article in *The Law Quarterly Review*, No. LXXV., it has been judicially declared that the state of the bankrupt trader extends its effects everywhere where the trader possesses any property; the administration of bankruptcy is one, indivisible, and universal.

In regard to England, the general principle seems to be that bankruptcy, or any proceeding in the nature of bankruptcy in a foreign country, where the bankrupt is domiciled, is an assignment to the trustees, assignees, curators, syndics, or others who, under the law of that country, are entitled to administer his property, of all his movables, or, in other words, of his chattels personal and *choses in action* in England; and it would seem, as far as English Courts can deal with the matter, of his movables situate in any other country.[1] France, in practice at any rate, if *Hoffman's* case, which Mr. Topham cites from the *Journal Clunet*, may be taken as typical, pays little or no respect to the unity or universality of the bankruptcy administration. It is an interesting case, and illustrates the difference between the French and the Italian treatment of the same question. Hoffman carried on business in London, with branch establishments in Paris, Milan, and elsewhere. He was declared bankrupt in England. Some Italian creditors attached his property in Milan. The Court there upheld the title of the English trustee as against those creditors on the ground that Hoffman was domiciled in England and the Italian branch was connected with the English house. After the declaration of the English bankruptcy, a French Court declared Hoffman bankrupt in respect of his branch establishment in Paris. The French Court of Appeal avowedly preferred the interests of French creditors to the principle of universality.

In these circumstances of international variance (*a*) as to the recognition of the title of the foreign assignee in bankruptcy as against local creditors, (*b*) as to the priority *inter se* where there are concurrent and competing bankruptcies, and (*c*) as to the proper test of competent jurisdiction to adju-

[1] Dicey, p. 144.

dicate a person bankrupt, *i.e.*, whether the competence should depend upon domicile in the strict legal sense of that term, or upon the personal residence of the debtor within the jurisdiction, or whether what may be called commercial residence should be sufficient to justify an adjudication, the only hope for uniformity in the recognition of the representative of the bankrupt appointed by a foreign Court appears to lie in an international convention. Why should that be impracticable? In regard to the administration of the debtor's property, where bankruptcy has been declared in more countries than one (as in *Hoffman's* case), suggestions of a scheme which seems to me both practical and practicable have already been put forward by Dr. Jitta, and are summarised in the article of *The Law Quarterly Review* to which I have already referred. The world of commerce, and for reasons stated by Mr. Topham the English part of it especially, suffers much from the present confusion, and the power of the world of commerce is great. There are no side currents of tradition or of religious or moral sentiment to divert or hinder the course of unifying reform in this direction, such as unfortunately must impede the achievement of unity in respect of the law of marriage. A real obstacle, it appears to me, to the success of procedure by international convention in all such matters is that, if the scheme involves a change in municipal law and a legislative sanction, it is not everywhere easy, in these busy times, to get a legislative authority, in the press of public affairs, to give sufficient time and attention to a matter which is devoid of political or party interest, and is too technical to create any enthusiasm in the general public.

And here, perforce, time compels me to conclude this address, cursory and incomplete as I feel it to be. The subject is too large and too intricate to be handled in a paper of this kind as one would wish to handle it; it is, alas! not one which inspires rhetorical audacity or lends wings to the flight of imagination. Forgive the absence of all such compensations for your patience. Let me comfort myself with the thought that those whom I have the honour to address are not gathered together here for the purpose of amusement or even for intellectual enjoyment. You are my brethren in the glorious study and profession of the law, assembled for serious conference; brethren whose united efforts may do much to make all men more brotherly, by composing in some measure the conflict of laws, and to give throughout Christendom to a decree of Justice, wherever made, universal significance.

TIME BARGAINS IN STOCKS AND PRODUCE.

[*Contributed by* ERNEST J. SCHUSTER, ESQ.]

Legislative Repression.—Mr. Vercamer on p. 3 (note 1) of his interesting work on this subject[1] gives the following quotation, purporting to be taken from Tacitus: "Hoc genus aleatorum in civitate nostra et semper damnabitur et semper retinebitur." I have been unable to find this passage in Tacitus, and it is probable that the author's memory played him a trick and led him to attribute to the "aleatores" the well-known dictum about the "mathematici" which runs as follows: "Genus hominum potentibus infidum sperantibus fallax quod in civitate nostra et vetabitur semper et retinebitur" (Hist. 1, 22).[2] The words as quoted by Mr. Vercamer, though not uttered by Tacitus, are true enough and ought to have set him thinking, inasmuch as they are not encouraging to an enthusiastic supporter of legislative measures against stock exchange gambling, or any other form of gaming or wagering. It is indeed, from the legislator's point of view, quite useless to enumerate the various means which have been employed for the suppression of venturesome business in stocks and produce, unless at the same time some information is supplied as to the success which such means of suppression have achieved. Mr. Vercamer says (Preface, p. iii): "Nous ne sommes pas de ceux qui s'inclinent aveuglément devant la tradition. Nous croyons pourtant qu'une tradition, qui a pour elle l'experience des siècles et un caractère de géneralité dans l'espace comme dans le temps, offre *a priori* de grandes garanties de vérité." But if the experience is not only of the "semper vetatur" but also of the "semper retinetur," its teaching cannot be used in favour of further legislative repression of speculative business. Upon reading Mr. Vercamer's book, one is struck by the honest efforts which have been made in most civilised countries for

[1] *Etude Historique et Critique sur les Jeux de Bourse et Marchés à Terme*, par Em. Vercamer, Conseiller à la Cour Mixte d'Alexandrie. Brussels: Bruylant-Christophe et Cie.; Paris: Maresq ainé. 1903.

[2] The translation of "aleatores" by "agioteurs" is incorrect, and the quotation purporting to be taken from Cicero Phil. 2. is a very garbled version of a passage occurring in Cat. 2, 10, which merely says that Catilina's set was frequented by gamesters, adulterers, and impure and shameless persons. Neither Tacitus nor Cicero have expressed the opinion on "agiotage" attributed to them by Mr. Vercamer.

the excellent purpose of restricting the temptations constantly offering themselves to the victims of the passion for gambling in stocks and produce, but we are completely left in the dark as to the effect of these efforts; nor are we told whether countries like France and Italy (where the *exception de jeu* has been practically abolished with respect to time bargains in stocks and produce) are penetrated to a larger extent by the speculative passion than other countries; or whether the ideal desired by Mr. Vercamer has been attained or approached in Germany, where the decisions of the Reichsgericht and the provisions of the Bourse Law of 1896 have combined to produce most stringent restrictions on time bargains.

Mr. Vercamer will probably admit that, so far, the legal prohibitions and restrictions have not been duly effective, but he seems to think that this is due to the fact that they have not gone far enough. One of the principal objects of his book is to extend the scope of the nullity of gaming and wagering contracts. Under the rule of Roman law the nullity of gaming debts was so consistently maintained, that it not only enabled an unsuccessful gambler to avoid payment of such a debt, but it even gave him the right to recover any money already paid by him to the winning party. The last-mentioned rule, according to Mr. Vercamer, seems still to linger in Scandinavia, but it has been swept away by modern law in all other countries in which it has ever existed. Mr. Vercamer deplores this fact as involving an indirect acceptance of the principle that a gaming debt produces at least a *naturalis obligatio*, and he contends that the only consistent and logical method of treatment of gaming debts is to assert their nullity to the same extent as in Roman law, and thus to recognise the right to the return of any sums actually paid. The advocacy of a proposal to that effect, which was brought before the Belgian Legislature, is indeed one of the principal objects of Mr. Vercamer's book, which winds up with the peroration: "Tant qu'on n'aura pas admis une certaine faculté de répétition on n'aura rien fait. Qu'on prenne exemple sur le droit scandinave. C'est du Nord aujourd'hui que nous vient la lumière." We do not think that Englishmen will be guided by the light of this "aurora borealis" as reflected in Mr. Vercamer's book. Public opinion in this country would not allow the assistance of the Courts of law to be invoked for the purpose of enabling unsuccessful bridge players or unlucky backers of the Derby favourite to recover their losses.

Comparative Views: England.—A topic which offers more interest to the student of comparative law and of the economic science is an enquiry on the rules under which speculative bargains in stocks and produce have been treated as gaming or wagering transactions under the laws of different countries. In England the Courts have established the rule that a contract which according to its real effect is not a genuine selling agreement, but an agreement for the payment of the difference between the selling price and the market price at the date nominally fixed for delivery, is

a gaming or wagering transaction, and therefore void (*Re Gieve* [1899], 1 Q.B. 794).

In Germany the Courts have gone much further in the direction of treating time bargains indiscriminately as gaming transactions. According to the consistent ruling of the Reichsgericht, the wagering intention may be inferred, notwithstanding the fact that neither the express nor the implied terms of the bargain would give colour to the assertion that it resolved itself into a stipulation for the payment of the differences. The Courts are at liberty to infer such an intention from the condition of life of the party repudiating the purchase or sale, from the size of the transaction and from other circumstances outside the express or implied terms of the bargain.

—— **Germany.**—The new German Civil Code has given legislative sanction to the rules laid down by the Courts, and even gone a step further, as is shown by s. 764, which runs as follows: "If an agreement for the delivery of goods or stocks is made with the intention that the difference between the agreed price and the stock exchange or market price at the date fixed for delivery should be paid by the losing party to the winning party, the agreement is to be deemed a gaming agreement. This consequence shall take place, even if one of the parties only had the intention that the difference should be paid, if the other party knew of such intention or by the application of proper diligence would have known." Under the former law it was at any rate necessary for the Court to infer an intention common to both parties; under the new law the mere knowledge or possibility of knowledge of the intention of the other party is sufficient.

—— **Italy and France.**—The laws of Italy and France expressly exclude time bargains in stock and produce from the application of the rules as to gaming or wagering transactions. As regards France, a statute of March 28th, 1885, provides that all time bargains (*marchés à terme*) in public or other stocks, and all bargains for future delivery (*marchés à livrer*) of produce or merchandise, are to be deemed lawful, and that no person shall be allowed, in order to escape the obligations resulting from such bargains, to avail himself of Art. 1965 of the Civil Code,[1] even if such bargains should resolve themselves into the payment of a difference. Mr. Vercamer is of opinion that this statute only refers to such time bargains as are truly intended to be carried out in accordance with their terms, and that it cannot be applied in any case in which it can be shown that the real intention of the parties was the ultimate payment of a difference. Unfortunately the Cour de Cassation holds the opposite view, and however dissatisfied Mr. Vercamer may be with the reasoning of the judgments in question, the French Courts are bound to follow them.

[1] The printer has been very unkind to Mr. Vercamer's references to this article, which on p. 255 is referred to as Art. 1695, while on p. 169 it appears as Art. 1865. The article declares that "the law does not allow any action to be brought for the recovery of a gaming debt or the payment of a bet."

The Rules of the Exchanges.—So far we have discussed time bargains without reference to the rules and methods of the associations by which the bulk of such bargains are now regulated in all important countries. In England associations of this kind have remained free from legislative interference, and the power which they have over their members, has practically rendered the rules of law prohibiting the enforcement of bargains for differences inoperative as regards the great majority of transactions of this nature. A large part of the business carried on under the rules of the London Stock Exchange, the Liverpool Cotton Exchange, the London Produce Clearing House, and other similar institutions is not entered upon with the intention of effecting genuine purchases or sales, but has for its real object the profit to be derived by the re-sale or re-purchase intended to be effected before the original purchase or sale is completed by delivery. The mechanism by which such transactions are carried out excludes by its nature the application of the *exception de jeu*. On the Stock Exchange the speculator effects his purpose by an original buying or selling agreement, supplemented if necessary by successive continuation agreements, which continuation agreements may on each separate occasion be made with a new party. A continuation agreement is an agreement to purchase or sell for the account day immediately following at a given price (being the market price of the day preceding the account day), and to sell or purchase for the next following account day at the same price plus an addition (which is called the contango) or minus a deduction (which is called a backwardation). The original transaction is a genuine purchasing or selling transaction on the part of the person buying or selling from the speculator. The party entering upon the continuation contract may merely intend to invest his money from account to account (the contango he receives representing the interest), or he may be a speculative vendor wishing to postpone his re-purchase (in which case, instead of receiving interest, he sometimes has to pay a backwardation). In any case the bargain between the parties to the original purchase and also each bargain between the parties to the successive continuation contracts is as between such parties intended to be carried out in accordance with its terms. The speculator, if his broker is a member of the Stock Exchange, and if he punctually pays any difference due by him on any account day, may generally rely on the possibility of avoiding delivery before the final winding-up of the speculation; but he would never be able to repudiate any individual agreement on the ground of its being a wagering agreement, as each such individual agreement is intended by both parties to be carried out in accordance with its terms. Brokers who are not members of the Stock Exchange (outside brokers) adopt entirely different methods, and so it happens that the only cases in which the *exception de jeu* comes before English Courts are cases between such outside brokers and their victims. The transactions on the produce exchanges are carried out by members who are bound by

arbitration agreements and do not bring their claims before the Courts. The bulk of speculative time bargains in stocks and produce entered upon in England is, owing to these circumstances, not affected in any way by the rules as to wagering contracts.

Bourse Law in Germany and Austria.—In Germany the Bourse Law of 1896 (see pp. 213-23, 267-76, of Mr. Vercamer's book) has established special rules with reference to bargains carried out on the stock and produce exchanges, the main principle of which rules is to establish a difference between professional and occasional speculators. In England, as we have seen, bargains entered upon under the rules of one of the recognised exchanges are by reason of the mechanism employed taken outside of the rules as to wagering contracts: in Germany, on the other hand, the law makes a definite distinction between professional and unprofessional speculators, and even the professional speculator is subject to a number of restrictions. Certain kinds of time bargains are forbidden altogether, if they take the character of public exchange transactions. These are: time bargains (*a*) in mining and industrial shares and in the shares of companies having a capital of less than twenty million marks; (*b*) in corn and flour; (*c*) in other stocks or kinds of produce prohibited by the Federal Court. In respect of other time bargains partaking of the nature of public exchange transactions and made between parties entered on a register kept for that purpose, neither party can avail himself of the defence that effective delivery was excluded by the agreement. On the other hand, if one of the parties was not entered upon the register, no right of action arises under a purchase or sale for future delivery even if it was a *bonâ fide* bargain for effective delivery. It was thought at first that the law might be evaded by transferring the scene of operations from the recognised exchange buildings, and the Berlin Produce Exchange in consequence migrated to the adjacent "Fairy Palace" alluded to by Mr. Vercamer on p. 223; but the Reichsgericht put a stop to this kind of evasion and established a definition according to which almost every kind of time bargain in stocks or produce partakes of the nature of a "public exchange transaction"; very little room is therefore left for the application of the ordinary law in the case of the usual type of time bargain in stocks or produce. Such bargains, if entered upon by persons registered on the public exchange register and not affecting any of the excluded classes of stocks or produce, are valid, though otherwise in the nature of gaming or wagering contracts; if, on the other hand, one of the parties is unregistered, the bargain between them is void, though it was a *bonâ fide* agreement for the future delivery of stocks and produce at an agreed price, both parties intending that the delivery should be made at the appointed time.

As regards Austria, Mr. Vercamer gives (on p. 351-61) a reprint of the draft of an amending statute dated 1885, which, however, did not meet with acceptance. Since then an elaborate report on the subject was

issued by an Enquiry Commission appointed in 1900, and a statute was passed in 1903[1] dealing mainly with the organisation of the public exchanges for agricultural produce, which are brought under more stringent Government control. All regulations for time bargains on the exchanges must be approved by the Government authorities, and such regulations cannot in any case authorise time bargains in corn and flour. Such time bargains, if partaking of the nature of public exchange transactions, are forbidden in the same way as they are in Germany. In other respects the law as to time bargains remains unaltered. As shown by this summary, the German example was followed to a very limited extent only.

—— **Principle of German Bourse Law.**—The main principle of the German statute at first sight is not without attraction. It sanctions speculative business in stocks or produce not belonging to the excluded classes, as long as the parties to such bargains are regularly engaged in such business. It was assumed that such persons could not object to register their names if by doing so they were able to exclude the application of the ordinary law as to gaming contracts. It was further thought that the nullity of agreements with unregistered persons could not be objected to, as every trader dealing with any such person was aware of his peril; and it was hoped that prudent traders would thenceforth avoid business with schoolmasters, minor Government officials, and others seeking to increase their scanty income by gambling in stocks and produce, and that an insidious temptation would thus be removed from a class of persons particularly prone to yield to it. Experience has, however, shown that the whole scheme was unworkable, because the very persons who were intended to be protected by registration refused to avail themselves of the protection offered to them, being reluctant to mark themselves out as professional gamblers and speculators. Moreover, the total prohibitions and other restrictions introduced by the law of 1896 have helped to move a large quantity of legitimate trade from Germany to other countries, without in any way stopping the gambling in mining shares and corn. The German statute declares that a time bargain partaking of the nature of a public exchange transaction made abroad, to which a person domiciled in Germany is a party, is void, if the German party is unregistered; but such a provision is of course futile, as the foreign dealer, always takes the proper measures for bringing the bargain under his own law and making it subject to the jurisdiction of the Courts of his own country.

Mr. Vercamer ironically characterises the opposition against the German Bourse Law as a protest "against the sacrosanct right to exploit one's neighbour" (p. 222), but if he had known anything about the personal qualities and position of some of the strongest opponents of the measures

[1] See Mayer, "Die österreichische Börsennovelle," *Zeitschrift für das ges. Handelsrecht*, vol. liv. pp 147-87.

in question he would hardly have made such an observation. The following statement made by Professor Laband in the *Deutsche Juristen-zeitung* (issue of March 15th, 1904, p. 274) speaks for itself: "A criticism of the Bourse Law of June 22nd, 1896, and an enumeration of the disastrous results to which it has led, is no longer necessary. An extensive literature exists on the subject, and the *exposé de motifs* accompanying the Amending Bill contains material so ample and so suggestive, and such convincing expressions of opinion, that any further discussion of the subject in this periodical has become superfluous. A door which stands ajar need not be opened by force." The Amending Bill prepared by the Imperial Government, which is now before the German Reichstag, and which is intended to remove some of the most objectionable provisions of the Act of 1896, proves in itself that that Act was a failure.

Experience of other Countries.—It appears that in Egypt legislation has been proposed by which time bargains in futures intended to result in the payment of differences only, are in some cases to be deemed valid (see Report of the Judicial Adviser to the Egyptian Government, p. 23), but this proposal has so far not led to any result.

As mentioned above, no evidence has as yet come forward to show that France and Italy—in which countries time bargains, though resulting in the payment of differences, are not classed as gaming transactions—are more affected by the gambling spirit than other countries. In England, as we have also shown, speculation aiming at the payment of differences is carried on on a large scale under the protection of the special mechanism of the public exchanges. The doctrine of the Courts as to such bargains inflicts occasional punishment on a class of persons who richly deserve it, but it does not affect the bulk of the speculative business of the country. Even in Germany, where the opposition against exchange transactions was stirred by party feeling of a particularly violent kind, some kinds of transactions, though aiming at the payment of differences only, were taken outside of the rules as to gaming contracts, and the amendment now proposed by the German Government extends the sphere of such transactions to a considerable extent.

The Trend of Public Opinion.—The general movement of public opinion does not therefore proceed in the direction indicated by Mr. Vercamer. The fact is, that every enquiry instituted by experts has shown that there is a large class of time bargains which, though of a somewhat speculative nature, are morally justifiable and economically useful. Even Mr. Vercamer is aware of this fact and of the danger of hampering legitimate trade, but he meets the difficulty by the statement (Preface, p. ii.) "qu'entre deux maux il faut choisir le moindre et que c'est donc la spéculation commerciale qui doit être sacrifiée sur l'autel de l'ordre public et des bonnes mœurs." This bold determination of the difficulty assumes that the sacrifice of legitimate enterprise would really further public morality, but the whole experience of

mankind has proved the contrary. The question whether a particular transaction has the character of a wager is not determined by the legal form which it takes. A genuine buying or selling transaction may be much more in the nature of a gamble than a bargain resulting in the payment of a difference. Whatever legislation does, as long as the gambling spirit exists a form will always exist in which it can be gratified. "Semper vetabitur et semper retinebitur." The suppression of the gambling spirit is a task for the moralist and the preacher; the legislator will never accomplish it.

MODES OF LEGISLATION IN THE BRITISH COLONIES: NORTHERN NIGERIA.

(Being answers to a series of questions addressed by the late Lord Herschell—the then President of the Society—to the Secretary of State for the Colonies, to obtain information respecting the Common and Statute Law of the several Colonies, the methods of legislation, the publication, revision, and consolidation of Statute Law and matters connected therewith: see vol. i., New Series, p. 70.)

[*Contributed by the* HON. H. C. GOLLAN, *ex-Chief Justice of Northern Nigeria.*]

1. THE questions asked in the late Lord Herschell's letter to the Secretary of State to the Colonies of August 16th, 1895, are framed to meet conditions likely to prevail in a British Colony, and consequently are not, in many cases, strictly applicable to a Protectorate; but where I cannot answer the questions literally, I have endeavoured to treat them as suggesting the sort of information that it is desired by the Society to obtain.

I.—COMMON LAW AS THE BASIS OF STATUTE LAW.

(*a*) *What is the Common Law of the Colony? Under what circumstances and by what authority was it introduced?*

2. The Common Law of the Protectorate is the Common Law of England and was introduced by s. 34 of the Protectorate Courts Proclamation, 1900. This Proclamation has now been wholly repealed, but its provisions, including those of s. 34, have been re-enacted in the Supreme Court Proclamation, 1902, and the Provincial Courts Proclamation, 1902.

3. It may be of interest and tend to elucidate the position if I were to give an account of the circumstances leading up to the enactment of s. 34 of this Proclamation. Previous to January 1st, 1900, the Administration in that part of the country which is now called Northern Nigeria, together with a considerable portion of what is now called Southern Nigeria, had been carried on by the Royal Niger Company under the provisions of a charter granted on July 10th, 1886, to it under its then name of the National African Company. The Company had established a judicial system and appointed as judges duly qualified barristers whose duty it was to decide all cases brought to them as provided by various regulations of the Company, but who were primarily appointed to supervise the administration of justice to foreigners, with the object of preventing international complications.

4. By s. D of Regulation X. the general principles of the administration of justice to foreigners was provided for in the following terms:—

(1) "In all civil causes between foreigners, or between foreigners and natives, and in all administrative and criminal causes to which a foreigner is a party, the general principles of law and procedure shall be, as far as is practicable, similar to those in usage in Great Britain or other European States, but careful regard shall always be had, where practicable, to the customs and laws of the nations or tribes to which the said parties belong, and no decision or sentence shall be held to be invalid on any technical objection as to the mode of procedure followed.

(2) "No sentence of death or imprisonment on a foreigner shall be carried out until confirmation thereof has been received from the Company, but foreigners under sentence may be detained in custody pending the decision of the Company."

5. By s. C of the same Regulation the following general principles were laid down as to the administration of justice to natives:—

(1) "The Supreme Judicial Officer, or any officer acting lawfully as his substitute, may, pending the formation of a code by the Company, make and follow such procedure as he may find expedient, and may give such decisions and pass such sentences as he may consider consistent with the nature of the case, but careful regard shall always be had to the customs and laws of the class or tribe or nation to which the parties respectively belong, especially with respect to the holding, transfer, and disposition of lands and goods, and testate or intestate succession thereto, and marriage, divorce, and legitimacy, and other rights of property and personal rights.

(2) "The District Agents' and other subordinate Courts shall follow such mode of procedure as the Supreme Judicial Officer or his substitute may from time to time lay down, and in the absence of such instructions they may follow such mode of procedure as they may find expedient, and may give such decisions and pass such sentences as they may think consistent with the justice of the case, reporting the same to the Supreme Judicial Officer or his substitute, who shall have power of revision of any such decision or sentence.

(3) "All sentences, whether by fine, imprisonment, or other punishment, shall be reported at the earliest convenient opportunity by post to the Company in London."

6. It may be of interest to give the definition of "foreigner" and "native" as it appears in Regulation XXVII. published on January 19th, 1886, by the Royal Niger Company: "In this Regulation, and in all others where not otherwise expressly provided, or where not inconsistent with the context, the word 'foreigner' shall be taken to mean any person or association (other than the Company acting as a Government) entitled to claim to be subject to any Power of Europe or America, or to any State recognised as a civilised State, or entitled to be personally under the protection of any

such Power or State, and all other persons shall be described as 'natives.' Provided that no person shall be deemed entitled to be personally under the protection of Great Britain, or any other Power or State, merely by reason that he is a native or subject of a country or territory over which such Power or State has declared a Protectorate."

7. I think I am quite accurate in stating that, though modified subsequently as regards details, the principles upon which the administration of justice was conducted up to the Proclamation of the Protectorate on January 1st, 1900, were such as are laid down in paragraph 5; and as a matter of fact no code was ever published.

8. In June 1900 notice to revoke the charter under which the Royal Niger Company had administered the Niger Territories, and that the Crown would take over the "rights and functions of administration" heretofore possessed and exercised by the Company, was given under the provisions of the charter.

9. It therefore became necessary to make provision for the Government of the territories to be taken over from the Royal Niger Company, part of which were to be erected into the Protectorate of Northern Nigeria, and this was done accordingly by the Northern Nigeria Order in Council, 1889, which came into operation on January 1st, 1900.

The material sections of that Order in Council, in connection with the question I am dealing with at the moment, are the following:—

(1) S. 6. Power is given to the High Commissioner to provide, by means of enactments to be called Proclamations, for the administration of justice, the raising of revenue, and generally for the peace, order, and good government of the Protectorate, *and of all persons therein*; although he is expressly enjoined to respect native laws by which the civil relations of natives are regulated, in so far as they are not incompatible with the exercise of Her Majesty's jurisdiction or clearly injurious to the welfare of the natives.

(2) S. 12. This section provides that, subject to the provisions of the Order in Council, or of any Proclamation made under it, all Statutes, Orders in Council, Rules, Regulations, or Treaties, together with any jurisdiction exercisable thereunder, which at the commencement of the Order were in force in Northern Nigeria, were to remain in force.

9*a*. The operation of s. 12 of the Order in Council was greatly diminished in effect by the fact that a number of Proclamations had been prepared which came into force simultaneously with the establishment of the Protectorate, and supplied the administration with at least a framework.

These Proclamations were:

1. The Authentication and Interpretation Proclamation (No. 1 of 1900).

2. The Authentication (Temporary Purposes) Proclamation (No. 2 of 1900).

3. The Residents Proclamation (No. 3 of 1900).

4. The Protectorate Courts Proclamation (No. 4 of 1900).
5. The Native Courts Proclamation (No. 5 of 1900).
6. The Official Oaths Proclamation (No. 6 of 1900).
7. The Cantonments Proclamation (No. 7 of 1900).
8. The Lands Proclamation (No. 8 of 1900).
9. The Public Officers' Protection Proclamation (No. 9 of 1900).
10. The Royal Niger Company's Regulations (Embodiment) Proclamation (No. 10 of 1900).

The titles of these Proclamations will speak for themselves, and the only provisions to which I need, in connection with the subject-matter of this part of my report, call attention are those of s. 34 (already referred to) of the Protectorate Courts Proclamation, 1900, and s. 37 of the same Proclamation which were in the following terms:—

S. 34. "Subject to the terms of this or any other Proclamation made for the Protectorate, the Common Law, the doctrines of equity, and the Statutes of general application which were in force in England on January 1st, 1900, shall, *so far as applicable*, be in force in the Protectorate.

S. 37. (1) "In proceedings in which natives are solely concerned, the Court shall take cognisance of any law or custom prevailing in the tribe or people to which the parties belong, and shall, in so far as such law or custom is not repugnant to natural justice or humanity, or incompatible with an express enactment contained in any Proclamation, enforce the same.

(2) "In proceedings where both natives and non-natives are concerned, the Courts may give effect to native law or custom where it appears to the Court that substantial injustice would be done to either party by a strict adherence to the principles of the law of England."

These sections of the Protectorate Courts Proclamation have, with the rest of the Proclamation, been repealed, but have been replaced by enactments to the same effect in the Supreme Court Proclamation, 1902, and the Provincial Courts Proclamation, 1902.

(*b*) *Is there any law applying exclusively to particular races or creeds?*

10. In Northern Nigeria there are a number of large Mahommedan States, such as Sokoto, Kano, Zaria, Bida, Illorin, etc., which, before they were brought under British rule, had attained an advanced civilisation with systems of administration of a distinctly elaborate character. Provision was made in them for the administration of justice by means of Alkalis and other judges with inferior jurisdiction. The law administered by them was the Koranic law with a certain admixture of local law, but I have not so far had either the time or the opportunity to discover how far the Koranic law was modified by local law and custom. In the course of conversation, Umoru, Alkali of Bida, who has a great reputation as a learned and upright judge, informed me that the principal text-book used by him was a commentary on the Koran by Sheikh Alilu of Medina.

There are also large tracts of country which were and still are pagan. As a rule the pagans are split up into small communities, which may on occasion combine for the purpose of offence or defence, but as a rule keep themselves to themselves. There are, it is true, some considerable pagan towns which by the very fact of their existence rendered essential the presence of a certain amount of law, and I am informed that there were often—if not usually—in them Mahommedan Mallams trained in the Koranic law who gave the administration of the law a certain form; but I understand that generally it might be said that the will of the individual in a pagan community was his law until he came into conflict with the will of one stronger than himself. He then either submitted for just as long as the stronger will could operate effectually against him—or was killed or enslaved. I personally, in any case, am not aware of the existence of anything that could be called a system of law amongst pagans in the sense that we use the term "law."

It may be of interest here to call attention to the Native Courts Proclamation, 1900, under which provision was made for the establishment of Native Courts which are empowered to administer "the native law and custom prevailing in the territory over which a Native Court has jurisdiction," in so far as such native law and custom are not repugnant to the express provisions of any Proclamation, but may inflict no punishments "involving mutilation, torture, or grievous bodily harm, or repugnant to natural justice and humanity."

II.—Statute Law.

(*a*) *Of what does the Statutory or Enacted Law of the Colony consist? To what extent is it embodied in Charters, Regulations, Orders in Councils, Ordinances, or Acts?*

11. The Statutory Law enacted for the Protectorate consists of:—

(1) Orders of the Sovereign in Council;

(2) Proclamations enacted by the High Commissioner in conformity with the powers conferred upon him by the Northern Nigeria Order in Council 1899.

Most of the enacted laws of the Protectorate are in the form of Proclamations, but the Sovereign has the power to legislate by Order in Council in all matters; and this power has been exercised on several occasions.

(*b*) *To what extent do the Statutes of the United Kingdom operate in the Colony by virtue of either:*

(i) *Original extension of the English law to the Colony;*

(ii) *Express provisions of any Order in Council or Charter;*

(iii) *Express adoption by the Legislature of Colony.*

12. On the administration coming into existence there was no such

original extension of English law to the Protectorate, as would have taken place in the case of a Colony formed by settlement.

But by the provisions of s. 34 of the Protectorate Courts Proclamation, 1900, the Statutes of general application which were in force in England on January 1st, 1900, were, so far as applicable, to be in force in the Protectorate.

(*c*) *Is the Statute Law of any other Colony in force in the Colony?*

13. The Statute Law of no other Colony is in force in the Protectorate; but in the Niger Navigation Order in Council, 1904, which enacts Chapter V. of the General Act of Berlin, and the Niger Transit Order in Council, 1904, which grants facilities to persons desirous of taking goods in transit through Northern Nigeria and Southern Nigeria, these two Protectorates have for reasons of convenience been treated as one.

(*d*) *Is any Code or any other body of Enacted Law of non-British origin in force in the Colony?*

14. I have answered this question as far as I am present able (see *supra*, para. 10).

III.—Methods of Legislation.

(*a*) *By whom are drafts of legislative measures prepared? Is there any official draftsman? If so, by whom is he appointed, to whom is he responsible, and what are his staff and duties? Do his duties extend to measures introduced by private or non-official members of the legislative body?*

15. The drafts of Proclamations are properly preparable by the Legal Advisers of the High Commissioner, who are the Attorney-General and the Solicitor-General, but as a matter of fact a very large proportion of the Proclamations actually enacted at the present time have, for various reasons, been prepared by the present Chief Justice. There is no official draftsman.

(*b*) *What is the constitution of the Legislative Chamber or Chambers through which measures have to pass?*

16. There is no council of any sort in the Protectorate. The draft when approved by the High Commissioner is merely signed by him and becomes the Proclamation from which printed copies are taken off (see ss. 2 and 3 of the Authentication and Interpretation Proclamation, 1900).

(*c*) *Are draft measures published before introduction or before any other stage? If so, under what rules?*

(*d*) *Through what stages does a measure pass before it becomes law?*

(*e*) *Is any opportunity afforded for referring measures, while in course of passage through the Legislature, to any special officer or Committee on points of form?*

These paragraphs contain questions inapplicable to the constitution of the Protectorate, where the High Commissioner is the sole legislative authority.

(*f*) *Have any steps been taken to secure uniformity of language, style, or arrangement of Statutes, either by means of a measure corresponding to Brougham's Act* (13 & 14 *Vict., No.* 21), *or to the Interpretation Act*, 1889, 52 & 53 *Vict., No.* 63), *or by official instructions or otherwise?*

17. SS. 9–20 of the Authentication and Interpretation Proclamation, 1900, contain provisions corresponding to the Interpretation Act, 1899, with the object of securing uniformity of language, style, and arrangement of Proclamations.

(*g*) *How are the Acts or Ordinances of the Colony numbered or distinguished? Are they numbered by reference to the calendar year, or to the regnal year, or in any other way? Is it the practice to confer for convenience a "short title" on each Act or Ordinance? How long has this practice been followed?*

18. Proclamations are numbered serially in the calendar year in which they are published—a new series being begun at the commencement of each year. A short title is always conferred on each Proclamation, and this has been the practice from the establishment of the Protectorate.

Orders of the Sovereign in Council applicable to the Protectorate are not numbered, but in nearly all cases a short title has been given.

(*h*) *Does any practice exist of accompanying a measure on its introduction by an explanatory memorandum?*

19. In practice the person who drafts usually submits to the High Commissioner an explanatory memo with his draft; and there are always discussions between the High Commissioner and the draftsman previous to the measure taking final form.

IV.—Publication of Statutes.

(*a*) *In what manner and under what authority are Statutes promulgated? What evidence is accepted of a Statute having been duly passed?*

20. Statutes are published in the *Official Gazette* as provided by s. 6 of the Authentication and Interpretation Proclamation, 1900.

A copy of the *Gazette* containing the particular Proclamation is accepted as evidence of the Proclamation having been duly passed. As regards rules and regulations made under a Proclamation, special provision is made in sub-s. 1 (2) of s. 14 of the above-named Proclamation that a copy of the *Gazette* or of any copy of any rule purporting to have been printed by the Government printer is *prima facie* evidence of the due making of the rule.

(*b*) *In what form or forms and under what authority are Statutes printed for publication?*

21. Once a Proclamation has been made, it is at once set up in type by the Government printer, and three copies on good paper are then struck off. These eventually become the authenticated copies, which must

be signed by the High Commissioner. One of them is kept by the High Commissioner, another in the Supreme Court, and the third is sent home to the Secretary of State. Then copies are struck off the same type as those from which the authenticated copies were taken (see ss. 2 to 5 of the Authentication and Interpretation Proclamation, 1900).

(*c*) *Are the Statutes of each session published in a collected form at the end of each session?*

22. The Proclamations for 1900 and 1901 have respectively been published in book form.

(*d*) *Are the periodical volumes of Statutes accompanied by:*

(i) *An index and table of contents;*

(ii) *A table showing the effect on previous legislation?*

23. The two volumes mentioned in paragraph 22, *supra*, have each a table of contents and an index, but there is no table showing the effect on previous legislation.

(*e*) *What collective editions (if any) of the Statute Law of the Colony have been published, and whether by the Government or by private enterprise? Are these or any of them periodical? Do such editions comprise those Acts of the United Kingdom in force in the Colony?*

24. No collective edition of the Proclamations of the Protectorate has yet appeared, but one is in process of preparation. It is to be published under the authority of Government. The proposed edition will contain a few of the Acts of the United Kingdom in force in the Protectorate.

Certain Acts in force in the Protectorate—viz., the Foreign Enlistment Act, 1870; the Fugitive Offenders Act, 1881; the Colonial Prisoners' Removal Act, 1884; the Official Secrets Act, 1889; the Foreign Jurisdiction Act, 1890, and the Demise of the Crown Act, 1901—have been published in book form already.

(*f*) *Is there any edition of "Selected Statutes" corresponding to Chitty's "Statutes of Public Utility"?*

25. There is no edition of Selected Statutes corresponding to Chitty's *Statutes*.

(*g*) *How are private Acts published?*

26. Private Proclamations—if there were any such—would, I apprehend, be published like any other Proclamation. No occasion has so far arisen for the consideration of this question.

V.—Revision of Statutes.

(*a*) *Have any steps been taken for the revision and expurgation of the Statute Law, whether periodically or otherwise? What machinery (if any) exists for this purpose?*

27. The Proclamation under which the Statute Law of the Protectorate will be republished contains provisions enabling the Commissioner appointed

to prepare the edition to omit all parts of Proclamations which have been repealed, whether impliedly or expressly, or which are spent.

No machinery for the periodical revision and expurgation of the Statute Law exists. The work would, when it was thought advisable to do it, be done by some official in the Government Service with a legal training.

(*b*) *Is there any edition of "Revised Statutes" showing those actually in force? If so, under what authority is it prepared and published, and what is the date of the latest edition? Is it published at periodical intervals, or how otherwise? Are the contents arranged alphabetically, chronologically, or on any other principle?*

28. It is proposed to arrange the contents of the edition chronologically. As regards the answers to the rest of the questions asked, see paragraph 27, *supra*.

VI.—Indexing of Statute Law.

Is there any general index to the Statute Law of the Colony? If so, on what principle is it arranged, and after what interval is it revised? Does it include both public and private Acts and Ordinances and the Statutes of the United Kingdom which are in force in the Colony? Is it accompanied by any tables showing how each Statute has been dealt with? What is the date of the latest edition?

29. There is no general index of the Statute Law of the Protectorate.

VII.—Consolidation and Codification.

(*a*) *What steps have been taken to consolidate the whole or particular parts of the Statute Law, or to codify any branches of the law?*

30. A Criminal Procedure Proclamation (No. 12) of 1903 has been published, and came into operation on January 28th, 1904. It is largely a mere adaptation of the Criminal Procedure Ordinance, 1876, of the Gold Coast, but there are differences of some importance rendered necessary by the difference in the prevailing conditions—the most important ones being the enormous distances and the lack of communications in the Protectorate.

31. A Criminal Code has also been prepared and sanctioned. It has been drafted largely on the model of the Queensland Criminal Code Act, 1899, but, in the course of preparation, the Criminal Code, 1892, of the Gold Coast, Sir J. Stephen's *Digest of the Criminal Law*, a draft Criminal Code prepared by Mr. H. L. Stephen, the Sudan Penal Code, 1899, and the Indian Penal Code were carefully considered and many provisions taken from them and included in the draft.

(*b*) *Does any machinery exist for this purpose. Is the work now in progress?*

32. No special machinery exists for the purpose of consolidation and

codification, but the desirability of both these objects is kept well in mind.

(*c*) *What codes are now in force in the Colony? When and by whom were they prepared, and on what materials were they based?*

33. As I have said in paragraph 30, *supra*, the Criminal Procedure Proclamation, 1903, is the only one actually in force. The two codes above named were prepared by the present Chief Justice of the Protectorate.

VIII.—Subordinate Legislation.

What official or other machinery exists for the preparation, passing, or promulgation of measures of subordinate legislation, such as rules or orders made by the Governor, or a Minister or Department under the express authority of Statute or Ordinance? Is there any, and what, collection of or index to such subordinate measures?

34. Rules or orders by the High Commissioner under the authority of Proclamations are usually drafted by one or other of the officials who prepare the drafts of Proclamations. They are published in the *Gazette* (see sub-s. 1 (*e*) of s. 14 of the Authentication and Interpretation Proclamation, 1900).

There is at present no collection or index to the rules or orders so far made, but it is intended to include them in the edition of the Statute Law of the Protectorate to which reference has previously been made; and to prepare an index of all Proclamations and rules, etc., included in that edition.

THE INTERNATIONAL MARITIME COMMITTEE: AMSTERDAM CONFERENCE.

[*Contributed by* R. B. D. ACLAND K.C.]

THE article of Mr. Carver in the Journal of the Society published in December, 1902, reported the work of the Maritime Committee at the Hamburg Conference held in September of that year. The present article is intended to show what was the outcome of the labours of the Commission appointed in obedience to the resolutions passed at that Conference, and to show what further steps have been taken in the task of unifying maritime law at the Conference held at Amsterdam under the presidency of Senator Rahusen during September of the present year. It is greatly to be regretted that the Conference was this year unavoidably deprived of the assistance of Lord Alverstone, Mr. Justice Phillimore, Mr. Carver, and the other legal members who have hitherto given such valuable help in its deliberations, and had it not been that the Bar Council had been asked to send delegates, English lawyers would not have been represented. Mr. English Harrison and the present writer attended on behalf of the Bar Council, but could not hope adequately to fill the places of the distinguished lawyers above mentioned.

There were three items on the agenda: the first a discussion on rights *in rem* and maritime liens; the second and third the consideration of the draft treaties prepared in accordance with the resolutions passed at earlier Conferences on the subjects of jurisdiction and limitation of liability.

Before the Conference proceeded with the business on the agenda, M. Franck, the Hon. Secretary, reported that the Belgian Government had invited all the maritime nations to attend an official diplomatic Conference to consider the draft treaties on collision and salvage which had been already prepared and are set out at pages 160–63 of No. X. of this Journal. He stated that the replies sent were such that the Conference would certainly be held, Great Britain and Holland alone declining to send representatives, the latter on the ground that her own code was in course of revision. M. Baernart, president of the Belgian Association, had referred in his speech in reply to the welcome offered to the Congress by M. Rahusen to the abstention of Great Britain, pointing out that that country of all others

had the greatest interest in securing a uniform law, and expressing his surprise at her refusal to be represented.

Shipping Property and the Law of the Flag.—The Conference then proceeded to consider the matters set down for discussion. In the preliminary reports sent in by the different associations and circulated among the members, great diversity of opinion was shown on the question whether an attempt should be made to secure a uniform law regulating property in ships, mortgage, rights *in rem*, and preferential rights, or whether these matters should be left to the law of the flag, and this difference of opinion was made more apparent in the discussion. It seemed, however, to be due, to some extent at all events, to a want of appreciation of the matters which were properly the subject of an international agreement of the kind contemplated. That this was so became evident after the statesman-like speech of Dr. Sieveking, who pointed out that in this connection there were some matters which probably concerned only the citizens of individual States and others which affected or might affect not only the compatriots of the owner of the ship, but also the citizens of other States; for ultimately the Conference passed without a division a resolution to the effect that such matters as ownership, transfer, and mortgages should be dealt with in accordance with the municipal law of each country and that an attempt should be made to secure the adoption of a uniform law regulating maritime liens.

Priority of Liens.—The question of priorities to be given to different liens was then discussed. A resolution was proposed by M. Franck asking the Conference to accept the English law on the subject, with the modification that the wages of the crew should give rise to a lien which should rank in front of all other liens. The English law on the subject may be summarised as follows: that liens rank inversely to the order of the dates of their coming into existence, except the lien arising out of a collision, which takes precedence of all liens other than that for a subsequent salvage. A long discussion arose on this proposal, from which it appeared that the representatives of the different associations were by no means agreed among themselves. Some were opposed to any collision lien at all; others approved of such a lien, but objected to the position accorded to it by English law. This difference of opinion led the President to divide the motion, and he accordingly first submitted to the Conference the question whether damage done by collision should give rise to a maritime lien. This was accepted by the votes of all the countries taken in the manner described in the article by Mr. Carver above referred to. The President then put the question whether the collision lien should have the priority assigned to it by English law, and this was rejected by a large majority, Great Britain and Japan alone voting for it. Ultimately, on the motion of one of the British delegates, it was unanimously resolved that it should be referred to a Committee to consider what position should be given to the collision lien and to report to a subsequent Conference on the whole question.

Jurisdiction in Collision.—The Conference then took up the consideration of the draft treaty which had been prepared since the Hamburg Conference dealing with jurisdiction in collision cases. The main debate was of course upon Art I., which, as will be seen from the translation of the draft set out below, defines the circumstances in which the Courts of the different countries should have jurisdiction. M. Autran, on behalf of the majority of the French Committee, moved a resolution to the effect that the only Court which should be able to decide finally upon the merits should be the Court of the defendant's domicile and of the ship's port of registry, while proposing to give jurisdiction to the tribunals of (1) the place of collision; (2) the port where one or other of the colliding vessels had called after the collision; (3) the place of arrest "seulement pour statuer les mesures d'instruction ou les mesures provisoires et conservatoires," of which the most familiar would seem to be the taking of evidence on commission and ordering bail. Notwithstanding the brilliant advocacy of M. Autran, the proposal found no supporters other than France, the feeling of the Conference being that however perfect such a scheme might be in theory, it was impossible of attainment partly because of the difficulties which would arise in practice—for example, that of deciding a collision case on evidence entirely taken on commission—but mainly because it would infringe on the rights of sovereignty of the different countries, which, if the proposal were accepted, would be asked to surrender their rights to administer justice between persons whose vessels had been injured within their jurisdiction.

The next question discussed at length was clause (*b*) of Art. I., by which jurisdiction is given to the Courts of a State simply because a collision takes place within its territorial waters, this clause having been inserted in consequence of a decision at the Hamburg Conference arrived at by only a small majority, and against the views of the representatives of France, Germany, the United States, and Great Britain. The report of the English Committee, signed among others by Lord Alverstone, Mr. Justice Phillimore, Mr. Carver, Sir John Glover, and Sir John Gray Hill, repeated the objections which they had previously urged against the proposal. Accordingly Mr. English Harrison, K.C., on behalf of the British delegates, moved its rejection. In the debate which followed, M. Galibourg (France) pointed out that unless some such provisions were inserted the owners of small coasters and fishing boats would be without remedy if injured by a large foreign vessel passing through the territorial waters of the State of which such owners were citizens, as they could not afford the expense of prosecuting their claim in the Courts of the defendant's country. On the other hand, M. Autran wittily observed that if the clause were passed it might give jurisdiction to the Courts of Patagonia in the case of a collision between a French and a British ship in the Straits of Magellan. Mr. English Harrison was supported by Dr. Sieveking, but in the result the clause was again carried by a small majority, notwithstanding that the votes of Germany,

Great Britain, and Belgium were against it, France on this occasion abstaining on the ground of an almost equal division of opinion among her delegates, and the United States of America not being represented. In order to meet the objections of M. Galibourg, in which there appears to the writer to be real substance, and at the same time to make the clause less objectionable, a proposal was submitted by Mr. Miller on behalf of the British delegates to amend paragraph (*b*) by limiting the jurisdiction of the territorial Court to cases where the plaintiff's vessel was registered in the country within whose territorial waters the collision took place; but the sense of the Conference was so evidently against the proposal that the amendment was withdrawn.

The remaining articles of the draft treaty were passed in principle, subject in some cases to redrafting and retranslation into English, a proposal by M. Leon Caen limiting the rights of the defendant to choose his own tribunal for his cross-action failing to find acceptance. A motion made on behalf of the British delegates was carried unanimously to the effect that a provision should be inserted in the draft treaty preserving the municipal law of each country with regard to collisions between privately owned ships and ships of war or other public vessels.

Limitation of Shipowners' Liability.—The last item on the agenda—the consideration of the draft treaty dealing with the limitation of shipowners' liability—was only reached late on the last day of the Conference. The time at the disposal of the Conference was not sufficient to enable it to give adequate consideration to the draft, and it was in the end resolved to pass it in first reading and to reserve for another Conference the debate on the details after it had been reconsidered and redrafted. Mr. McArthur expressed the hope that if the clause enabling the shipowner to limit his liability on matters arising *ex contractu* were omitted, the draft might find general acceptance in Great Britain.

Copies of the official translations of the drafts of the two treaties above referred to appear at the end of this article.

Impressions of the Conference.—Certain vivid impressions remain on the mind of the writer produced by his attendance for the first time at a Conference organised by the International Maritime Committee: the first, that of a body of men gathered from nearly every nation in Europe intent on trying to discover the bases on which a system of law could be built which should become the law of all countries, each member, when need be, fearlessly advocating his own view, but never unduly insisting that the law of his own country should be accepted, and indeed not infrequently rejecting or unfavourably criticising it; the others more personal, and concerning the individuals composing the Conference. The judge was there, the professor, the student, the advocate, the man of business, shipowner and shipper, underwriter and average adjuster, but two figures stand out in the recollection of the writer beyond all others, the one a judge, the

other an advocate—Dr. Sieveking, the honoured President of the Hanseatic Court, who is just completing twenty-five years' service in that capacity; and M. Autran, the brilliant Marseilles advocate and president of the French Association of Maritime Law.

Speaking with equal force and fluency in either French or English, never speaking his own language because, as he said, he found it was not well understood by the majority of those present, and seldom intervening in debate, when Dr. Sieveking addressed the Conference he always produced a profound impression. If the debate tended to descend to details too minute for such a meeting or trenched upon matters which belong rather to the domain of the statesman than that of the lawyer, a few weighty words from Dr. Sieveking would restore the discussion to its appropriate sphere and its proper level, while his contributions to the discussion were marked not merely by a wonderful knowledge of systems of law other than his own, but by a strong sense of what was possible and impossible of attainment. M. Autran, always a graceful Frenchman and in many respects a complete contrast to the President of the Hanseatic Court, never failed to win the applause of every one present, whether they could subscribe to his opinions or not, by his unfailing charm of manner, his ability and the perfect form of his speeches. Though sometimes perhaps a little unpractical in his suggestions, he gained adherents by the brilliance of his advocacy whom an equally learned and equally logical speaker would never have gained, even in such an assembly, by a less polished address.

Value of the Work of the Conference.—It is difficult to form any estimate of the ultimate value of the work of the Conference of this year. Unlike the Hamburg Conference, that of Amsterdam did not finally dispose of either of the draft treaties submitted for discussion, and the resolutions passed with regard to maritime liens were of such a character that it cannot be said that any very great step forward has been made in dealing with that subject. But for all that it is impossible not to feel that useful work was done, even though it was the work of clearing the way for more definite proposals in the future, by disseminating among persons of many nationalities interested in the subjects discussed some knowledge of the methods of thought and opinions of jurists and men of business belonging to countries other than their own, and by affording opportunity for reconsideration of previously expressed opinions—an opportunity the value of which in such work as the Conference aspires to accomplish can hardly be over-estimated.

No record of the Conference would be complete without a reference to the excellent arrangements made for the meeting, which were largely if not entirely the work of the indefatigable Hon. Secretary, M. Franck, and his assistants, and to the urbanity and tact with which the President, M. Rahusen, managed the meeting, composed, as it was, of persons of many nationalities. Acknowledgment should also be made of the exceeding kindness and hospitality extended to members of the Conference and those

who accompanied them by the Burgomaster of Amsterdam and his wife, Madame Van Leeuwen, by the Dutch Maritime Law Committee, the Chamber of Commerce of Rotterdam, and many private individuals. No unpleasant incident marred the proceedings of the Conference, and the intercourse of the members among themselves was cordial in the extreme.

DRAFT TREATY AS TO JURISDICTION IN COLLISION CASES.

ARTICLE I.

Carried.—The action founded on collision can be brought exclusively at the option of the plaintiff:

(*a*) Before the tribunal of the domicile, personal or commercial, of the owner of the defendant ship.

In the case where the defendant is a company, the action can be brought before the tribunal of the place of business of the company.

(*b*) Before the tribunal of the place of collision when the collision has taken place in territorial waters appertaining to the contracting States.

(*c*) Before the tribunal of the port where the ship of the defendant is registered.

(*d*) Before the tribunal of the place where the ship of the defendant has been seized even in the case where before the service of summons the seized property has been freed from arrest and replaced by bail.

ARTICLE II.

The tribunal competent to take cognisance of the principal action shall be equally competent to determine the counterclaim brought by the defendant against the plaintiff by reason of the same collision.

ARTICLE III.

The tribunals referred to in the preceding articles are designated by the national laws.

ARTICLE IV.

The plaintiff can only bring one single action founded on the same collision even if several tribunals situated in different States happen to be competent by virtue of Art. I., provided, however, that he has been satisfied by the defendant in accordance with judgment obtained.

ARTICLE V.

The tribunals referred to in Art. I. shall be equally competent to order provisional enquiries to enable the tribunal seized of the action to secure certified evidence.

ARTICLE VI.

The seizure to preserve rights ot a ship by reason of a collision can be put in force in every port situate in the territory of the contracting States.

(*a*) Such seizure can only be made with the permission of the competent authority designated by the national laws.

(*b*) The authority specified by the preceding paragraph can order the plaintiff to provide bail as security for such damages as may result from the seizure.

(*c*) The owner of a ship seized may demand the withdrawal of the arrest upon sufficient bail being given.

(*d*) The formalities to be complied with to ensure the validity of the seizure are regulated by the national laws.

DRAFT TREATY ON THE LIMITATION OF SHIPOWNERS' LIABILITY.

I. When the owner of a ship is held responsible according to the law of the country for the acts of the master and crew or for the engagements entered into by the master in virtue of his legal capacity, his liability for each voyage is limited—

(*a*) To the ship or its value at the end of the voyage, at the option of the owner;

(*b*) To the net freight for the voyage until its termination;

(*c*) To the indemnities due to the owner for general average, collision, or other damage suffered by the ship during the voyage, subject to deduction of the expenses incurred in putting the ship in a fit state to complete the voyage.

The right of the creditors does not include the claim of the owner against the insurer.

By net freight is meant the gross freight and passage money, even if paid in advance, deduction being made of the charges which are proper to the same.

The voyage will be considered ended after final discharge of the goods and passengers happening to be on board the ship and shown on the manifest at the moment when the obligation has arisen, and in case of successive obligations after final discharge of the whole of the goods and passengers happening to be on board at the moment both of the one and of the other event.

If the vessel carries neither goods nor passengers, the voyage will be considered ended at the first port it puts into or at the particular port where it happens to be.

II. If the owner elects for the abandonment of the ship and does not carry this into effect until some time after the end of the voyage, he is only freed up to the amount of the value of the ship at the moment of abandonment, and he remains bound for the difference between this value and that which the ship had at the end of the voyage.

III. In the case provided for in Art. II. and to provide for the case where the owner elects so far as concerns the ship for the payment of its value at the end of the voyage, the valuation may at every time after the end of the voyage be judicially fixed by proceedings taken after due notice to the other side, at the demand of the party who is the most diligent.

IV. The owner has the right to substitute for the modes of obtaining freedom from liability provided in Art. I. payment of an indemnity limited for each voyage to £8 sterling per ton of the gross tonnage of his ship.

V. If there exists a priority of lien upon the ship or upon the freight in favour of creditors in respect of whom limitation of liability is not admitted, the owner of the ship will be personally bound to make up in specie, to the extent of the sums first collected by such creditors, the amount forming the limit of his liability.

VI. The limitation of liability determined according to the preceding articles will be applicable to contracts concluded even by the owner of the ship, so far as their

execution lies within the legal duties of the master, without his having cause to distinguish if the breach of those contracts is due to a member of the crew or not, the case of personal fault of the owner alone excepted. It applies also to damages caused to dykes, quays, and other fixed objects as well as to the removal of wrecks. It is not admitted for the wages of master and crew.

VII. When according to the laws applicable the limitation of liability for damage to property is different from that for personal injury, the present treaty shall only have effect so far as concerns damage to property.

JUDICIAL SEPARATION.

ENGLAND.

[*Contributed by* EDWARD MANSON, ESQ.]

THE indissolubility of marriage is part of our inheritance from Christianity. The ancient world knew it not. Rome came nearest to its practical realisation. For five hundred years down to the second Punic War there was no recorded case of divorce at Rome; and when Spurius Carvilius Ruga in 230 B.C. repudiated his wife for barrenness, his conduct was regarded with general disapprobation. But this idyllic state of virtue was due, as Gibbon points out, rather to the wife's subjection under the husband's *patria potestas* and the severity of ancient manners than to any ideal of wedlock. In theory of Roman law there was no indissolubility about marriage, and as women gained their independence, and the corrupting influence of Greece spread, the results of the freedom of divorce allowed by law were seen. Family ties became relaxed with "fearful rapidity" (Mommsen). By the time of Augustus neither sex could be cajoled nor coerced into marriage.

Christianity and Marriage.—Christianity brought a new order, and with it a new conception, of marriage. Even the best Romans—men like the Censors Metellus and Cato the Elder—had looked on a wife in the light of a necessary evil. The Roman citizen was to marry, not for his own happiness and welfare, but because he owed a duty to the State, to supply it with children. Christianity consecrated and spiritualised marriage. It was a holy estate, a type of the mystic relation between Christ and his Church, and as such invested with a peculiar sanctity. The mutual vows exchanged by the spouses in the face of the Church and in the presence of God constituted a sacrament, and the contract of marriage so solemnised was by the Canon Law of Christendom declared indissoluble. The annulment of marriage for certain causes in no way infringed this doctrine of indissolubility, for in such cases no marriage in the true sense was ever constituted. And not only was marriage indissoluble: it was specifically enforced. If either spouse deserted or defrauded the other, he or she might be compelled to fulfil the vow made at the altar; the husband to take his wife home and treat her as a wife, the wife to return to her

allegiance to her husband. To this day the law of England does the same—decrees restitution of conjugal rights—though the remedy by attachment of the recalcitrant spouse has given place to the remedy of a judicial separation.

The State and the Home.—The indissolubility of marriage, so declared and enforced by the Christian Church, has been accepted by nearly all civilised nations as the basis of their marriage system. They have recognised, by a sort of instinct of self-preservation, that marriage is a social institution upon which, more than upon anything else perhaps, the welfare of the State depends: that the State is founded upon the hearthstone. It has risen out of the family, it is maintained by the family. "Whoever studies history," says Frederick Robertson of Brighton, "will be profoundly convinced that a nation stands or falls with the sanctity of its domestic ties." Cardinal Manning once well said: "That which makes a people is domestic life. The loss of it degrades a people to a horde. The authority and the duties and the affections, the charities and the chastities of home, are the mightiest and purest of all influences, the foundation of human life. A good home is the highest and best school."

The doctrine of indissolubility stands as the symbol and witness to this truth, and the Church has constantly opposed all attempts to relax it. Yet we are fain to recognise that the doctrine of indissolubility of marriage as the world is constituted is a "counsel of perfection," an ideal not maintainable in its sublime simplicity. The passions, the frailties, and the follies of human nature have for ever closed the gates upon that Eden. Even the mediæval Church was wise enough to see that this yoke of indissolubility was too heavy for the shoulders of its members, and it conceded so much to the frailty of human nature as to allow a divorce *a mensâ et thoro* in certain classes of cases; and so the matter stood at the date of the Reformation. The general reaction against Catholicism and its doctrines expressed in the Protestant movement extended itself naturally to marriage, and coloured the Reformers' view of the nature of that union.

The "Reformatio Legum Ecclesiasticarum."—It took practical shape in the Commission for the Reformation of the Ecclesiastical Laws presided over by Archbishop Cranmer. The resolutions of this Commission never became law, but as an historical document evincing the attitude of the Reformers towards marriage, the "Reformatio Legum Ecclesiasticarum" is full of significance. It explicitly condemns—perhaps this is the most striking thing about it—the divorce *a mensâ et thoro* as unscriptural. "Mensæ societas et thori," say the Reformers, "solebat in certis criminibus adimi conjugibus, salvo tamen inter illos religio matrimonii jure: quæ constitutio cum a sacris liberis aliena sit et maximam perversitatem habeat et malorum sertinam in matrimonium comportaverit, illud auctoritate nostrâ totum aboleri placet." And following up this pronouncement, the Reformers held that adultery, persistent desertion, bad treatment—"malæ tractationis

crimen," even what they term "inimicitiæ capitales"—ought to be a ground for the judge to decree divorce, and permit the injured spouse to contract a new marriage.

Parliamentary Divorce.—It was out of sentiments like these that divorce by private Act of Parliament grew, but it did not establish itself without a struggle. Lord Ross's Bill (1669), the first presented for Parliamentary relief, was passed by a majority of eight votes only, all the Catholic peers and nearly all the bishops voting against it, but the jurisdiction took root, and some two hundred and fifty divorces *a vinculo* were granted on Bill down to the date of the Divorce Act, 1859, most of them on the ground of the wife's adultery, but also in some instances on the ground of the husband's adultery aggravated by other circumstances. In all these cases it was a condition precedent to the relief asked that the promoter of the Bill should have obtained a decree of divorce *a mensâ et thoro* from the Ecclesiastical Court, and this fact helps to explain—what is otherwise a difficulty—how the jurisdiction came to be assumed, the theory on which Parliament proceeded. It seems to have been this: Marriage was a contract. Adultery—on the wife's part at least—went to the root of the contract, and entitled the husband to a dissolution. The Ecclesiastical Court had put asunder those whom God had joined together, had nullified the essential incidents of marriage, but on the sacramental view of marriage the Ecclesiastical Court could go no further; it could not dissolve the union. With Parliament the case was different. It was not bound by any canonical rules. With the divorce *a mensâ et thoro* the substance of the marriage union was gone. Why should not the formal bond—the shadow—go with it, not in all cases, but in those in which the wife had been guilty of adultery, or the husband of aggravated adultery, going equally to the root of the contract?

Bishop Cozens, who was one of those who took part in the discussion, puts the question thus: "The bond of marriage is to be inquired into what it properly is. Being a conjugal promise solemnly made between a man and his wife that each of them will live together according to God's holy ordinance, notwithstanding poverty or infirmity or such other things as may happen during their lives, separation from board and bed, which is part of the promise to live together, doth plainly break that part of the bond whereby they are tied to live together both as to bed and board. The distinction between bed and board and the bond is new, never mentioned in the Scripture and unknown to the ancient Church: devised only by the canonists and schoolmen in the Latin Church—for the Greek Church knows it not—to serve the Pope's turn the better till he got it established in the Council of Trent. Bed and board or cohabitation belong to the essence and substance of matrimony, which made Erasmus and Bishop Hall say that the distinction of these two from the bond is merely chimercal and fancy."

But whatever the merits or demerits of divorce by private Act of Parlia-

ment, it had this serious drawback—that the remedy was one open to the rich alone. Mr. Justice Maule in his ironical address to the convicted bigamist put the cost of it at £1,000. Justice required that if the remedy of dissolution was given by law, it should be available to the poor as well as to the rich. The whole subject was accordingly referred in 1850 to a Royal Commission, and the Divorce Act of 1857 was based upon the recommendations of the Commission.

The Divorce Act of 1857.—The chief innovation consisted in the constitution of a new Court for the settlement of matrimonial disputes. The substantive law was little changed. The doctrine of the indissolubility of marriage was adhered to as a first principle, partly on the sacramental view of marriage, partly as a matter of practical policy. If husband and wife realise that they cannot get free, that marriage is indissoluble, they accommodate themselves to the situation, and put up as best they can with one another's failings, whereas the very possibility of getting free makes against mutual forbearance and aggravates matrimonial discontent. Marriage accordingly was to be dissolved only on the Scriptural ground of adultery; and in the case of a husband, the adultery must be coupled with cruelty or prolonged desertion. Judicial separation took the place of the old ecclesiastical divorce *a mensâ et thoro*. It might be granted on the ground of the husband's adultery or cruelty or desertion.

In thus formulating the law, the Legislature was taking the *via media* so congenial to the English temper. It saved the principle of indissolubility, it shunned the Charybdis of too great freedom of divorce: at the same time it afforded, in the judicial separation, relief—of a sort—to spouses estranged by unhappy differences. The Act proved an almost alarming success. Lord Campbell in his Diary says: "I have been sitting two days in the Divorce Court, and, like Frankenstein, I am afraid of the monster I have created." He would be more disquieted to-day could he see the increase in the number of divorce petitions. They have risen from 533 in 1893 to 899 in 1902; 584 decrees for dissolution were made absolute in 1902. This is of course regrettable; still, divorce *a vinculo* is not without its redeeming features. The matrimonial venture has failed, the spouses have made shipwreck of their happiness, but with the decree absolute there is an end of it, and the late espoused are left free to begin life over again as well as they can. It is otherwise with the situation created by a judicial separation.

Judicial Separation: A "Deplorable" Situation.—Sir Francis Jeune lately described that situation as "deplorable," and the epithet is not a whit too strong. Judicial separation destroys all that truly makes marriage—the *consortium vitæ*: it leaves the bare legal bond, the formal contract subsisting with none of the amenities attaching to the married relation. Lord Palmerston—who was a shrewd man of the world—says with great truth: "The position in which man and wife are placed by judicial separation is most objectionable. If marriage is to be dissolved at all, let it be dissolved

altogether: let the parties be entirely set free and be able to contract other engagements. Parting man and wife by judicial separation places both in situations of great temptation where they are liable to form connections which it is not desirable to encourage" (Hans. cxlv. 1194).

Separation Orders: The Summary Jurisdiction (Married Women) Act, 1895.—Yet this is the situation which the Courts are now multiplying with startling rapidity, not so much the Divorce Division of the High Court—the judicial separations pronounced by that Court in 1902 were only forty-nine—but the magistrates throughout the country under the new jurisdiction conferred on them by the Summary Jurisdiction (Married Women) Act, 1895. This Act runs as follows:—

> Any married woman whose husband shall have been convicted summarily of an aggravated assault upon her within the meaning of s. 43 of the Offences against the Person Act, 1861; or whose husband shall have been convicted upon indictment of an assault upon her, and sentenced to pay a fine of more than £5 or to a term of imprisonment exceeding two months; or whose husband shall have deserted her; or whose husband shall have been guilty of persistent cruelty to her or wilful neglect to provide reasonable maintenance for her or her infant children whom he is legally liable to maintain, and shall by such cruelty or neglect have caused her to leave and live separately and apart from him, may apply to any Court of Summary Jurisdiction acting within the city, borough, petty sessional or other division or district in which any such conviction has taken place, or in which the cause of complaint shall have wholly or partially arisen, for an order or orders under this Act.

And thereupon the Court may make an order or orders containing all or any of the provisions following, viz.:—

> (*a*) A provision that the applicant be no longer bound to cohabit with her husband (which provision, while in force, shall have the effect in all respects of a decree of judicial separation on the ground of cruelty).
>
> (*b*) A provision that the legal custody of any children of the marriage between the applicant and her husband while under the age of sixteen years be committed to the applicant.
>
> (*c*) A provision that the husband shall pay to the applicant personally, or for her use to any officer or third person on her behalf, such weekly sums not exceeding £2 as the Court, having regard to the means both of the husband and wife, consider reasonable.
>
> (*d*) A provision for payment by the applicant or the husband, or both of them, of the costs of the Court and such reasonable costs of either of the parties as the Court may think fit.

A separation order under this Act has all the effects of a judicial separation. By the following section (s. 6) no order is to be made under the Act on the application of a married woman if she is proved to have committed an act of adultery, provided the husband has not condoned or connived at, or by his wilful neglect or misconduct conduced to, such act of adultery.

It appears from the latest Judicial Statistics that in the year 1902 no

less than 7,477 separation orders—in other words, 7,477 judicial separations —were granted by Courts of Summary Jurisdiction under the powers of this Act—"250 times as many," says Sir John Macdonell, "as similar orders made by the High Court"!

These are startling figures, not only in the mass of matrimonial misery they reveal, but in the social consequences which such separations involve —so many spouses hopelessly estranged yet disabled from contracting a fresh union.

But what, it may be said, is to be done? These people cannot live together; on the other hand, the welfare of the community will not permit of too easy divorce, of couples being unmarried wholesale in all cases where a judicial separation has been granted.

A Discretionary Jurisdiction—The remedy seems to be to enlarge the jurisdiction of divorce *a vinculo* on the lines of the "Reformatio Legum Ecclesiasticarum"—adultery, persistent desertion, *malæ tractationis crimen, inimicitiæ capitales*—and within these enlarged statutory limits to leave the question of judicial separation or dissolution to the discretion of the Court. In a matter of such nicety as matrimonial relations a large judicial discretion wisely administered is the best, if not the only, mechanism for doing justice.

By all means let the State strictly safeguard marriage; but let it also beware lest by overmuch rigour it defeat the very end for which it is striving and deter people from marrying at all. If there is to be no escape from the purgatory of an intolerable marriage, many will decline altogether to take the risk of marriage at such a price; like the learned Selden who calls marriage a "desperate thing." "The frogs in Æsop," he says, "were extreme wise. They had a great mind to some water, but they would not leap into the well because they could not get out again." The danger is a very real one. Already serious symptoms are discernible of an anti-matrimonial tendency.

GERMANY.

[*Contributed by* JULIUS HIRSCHFELD, ESQ.]

The Code Civil.—The German Civil Code provides:—

Par. 1575. A party (husband or wife) having a cause of action for a divorce, may, instead of petitioning for a divorce, petition for the dissolution of the matrimonial communion. Should, however, in that event, respondent move that if petitioner succeeds a divorce be decreed, the Court shall decree a divorce.

Par. 1576. Where a dissolution of the matrimonial communion has been granted, either party may subsequently apply for a decree of divorce, unless cohabitation should have taken place in the meantime.

Par. 1586. The dissolution of the matrimonial communion carries with it all the consequences of a divorce, precluding, however, the contracting of another marriage.

—— **Its History.**—A short historical retrospect will be useful for the better understanding of these provisions. Since the twelfth century until the time of the Reformation the bond of a consummated marriage could nowhere in Germany be judicially severed, and the utmost relief, granted only in cases of carnal guilt, was a decree of perpetual separation *quoad mensam et torum.* The innocent party was at any time entitled to a rescission of such an order and was even required by the ecclesiastical authorities to have it rescinded, if himself (or herself) guilty of adultery.

After the Reformation this doctrine and practice, based on the sacramental conception of the marriage, lost in Protestant countries their general acceptance by the substitution of the Protestant Canon Law which rejected it in respect of Protestant marriages, and subsequently by the transfer of the matrimonial jurisdiction from the ecclesiastical to the secular Courts.

As an example of development in this direction may serve the law of Prussia, codified under Frederick the Great and Frederick William II. The Code abrogated entirely *separatio quoad mensam et torum* and provided that the secular Courts shall only decree divorces and treat decrees of separation issued by the ecclesiastical Courts—which latter were still in existence—in every way on the same footing with divorces. It leaves it to the conscience of the individual if he (or she) will contract another marriage. In 1849, the ecclesiastical jurisdiction being abrogated in Prussia, *separatio quoad mensam et torum* disappeared altogether from the Prussian system of law. Other States however—*e.g.*, Saxony—preserved the pre-Reformation system.

This disparity remained until 1875, when an Act was passed which not only abolished for the whole empire the jurisdiction of ecclesiastical Courts in matrimonial disputes, but also provided that in future only divorce and never *separatio* should be decreed by the Courts.

The first Commission appointed to draw up a Civil Code for the German Empire, after exhaustive deliberation, adhered on principle to this state of the law, but provided in some cases for a decree of temporary separation—not to exceed two years—after the expiration of which the petitioner should be at liberty to apply for a divorce. The second Commission appointed to revise the first Draft Code eliminated separation—temporary as well as perpetual—entirely, holding that denominational (Roman Catholic) considerations should not influence general State legislation.

The Compromise.—In the course of the Parliamentary debates on the revised Code, motions concerning the re-instatement of *separatio* were brought forward. They would, however, probably have been rejected but for the ardent support, quite unexpectedly given to them, by the representatives of the Bavarian Government, who threw all the weight of the greatest Catholic German State into the scale. Their principal argument was that Roman Catholics in matrimonial disputes would have to seek ecclesiastical sanction,

which latter would go in one direction—viz., separation—whilst the State would be bound to determine them another way. A conflict would necessarily ensue. In order to avoid such a result, disturbing the peace of the minds of the large Catholic populations, a provision satisfying their consciences should be introduced. The point was pressed with so much insistence that the Federal Council and the Imperial Diet, in order to prevent the wrecking of the whole Code, had to give in, and the above paragraphs were inserted. In this manner a party who adheres to the doctrine of the indissolubility of the bond can save his soul by applying for a separation and leave it to the other party, which may not be affected by such scruples, to petition for a divorce. The anomalous feature of the law from an equitable and logical point of view is, that it gives the guilty party the power of setting at naught the intentions of the innocent party.

Grounds for a Separation.—As regards the grounds on which separation, like divorce, can be sought, the German law distinguishes between absolute and relative ones. Absolute grounds are adultery, bigamy, sodomy and bestiality, attempt at the life of the other, malicious desertion, and incurable insanity (Civil Code, Pars. 1564-9). The relative grounds are set forth in a *clausula generalis* which runs thus: "A married person may sue for a divorce if the other through a gross violation of the duties imposed by marriage, or through dishonourable or immoral conduct, has brought about such a thorough subversion (*zerrüttung*) of the matrimonial relationship that the innocent party cannot be expected to continue the married life. Aggravated insult is deemed to be a gross violation of duty" (Civil Code, Par. 1568).

The juridical nature of the relationship created between the parties by a decree of separation is controversial. Some writers are of opinion that it dissolves the marriage (like a divorce) subject only to certain qualifications; others hold that the marriage continues, subject however to a cessation (or suspension) of matrimonial communion and other effects of a divorce.

International Law and Statistics.—As regards International Law, Art. 17 of the Introductory Act (qualified by the principle of *renvoi* Art. 27) to the Code provides that questions of divorce shall be governed by the law of the country to which the husband (as a subject) at the time of the petition belongs, and further that divorce and also separation can only be decreed on the ground of foreign law if according to such foreign law, as well as according to German law, a case for divorce can be established.

The German official statistics do not discriminate between cases of divorce and cases of separation. The aggregate number of dissolved marriages in 1901 amounted to 8,037.

ITALY.

[*Contributed by* R. W. LEE, ESQ., *and* R. G. CORBET, ESQ.]

The Italian Civil Code (I. tit. 5. c. 10), provides—

148. Marriage is not dissolved except by the death of one of the parties; but their personal separation is allowed.

149. The right of applying for a separation belongs to the parties only in the cases specified by law.

150. A separation may be applied for on the ground of adultery or wilful desertion, and on the ground of excesses, cruelty, threats and grievous insults.[1] An action for separation on account of the husband's adultery does not lie unless he maintains the concubine at home or notoriously elsewhere, or the circumstances are such that the act constitutes a grievous insult to the wife.

151. A separation may also be applied for against a party condemned to a criminal punishment, except where the sentence was prior to the marriage and the other party was aware of it.

152. The wife may ask for a separation when the husband, without just cause, does not fix a residence, or, having the means of doing so, refuses to fix one in a manner suitable to his circumstances.

153. Reconciliation extinguishes the right to ask for a separation; it also involves the abandonment of any application previously made.

154. The Court decreeing the separation shall declare which of the parties is to have the custody of the children and provide for their maintenance, education, and instruction. The Court, for weighty reasons, may order the issue of the marriage to be placed in an educational institution or with a third party.

155. Whoever the person may be to whom the children are entrusted, the father and mother retain the right to watch over their education.

156. The party owing to whose fault the separation was decreed loses the portion of the survivor,[2] all the advantages granted by the other party through the marriage contract,[3] and the legal usufruct as well. The other party retains the right to the portion and to every other advantage dependent on the marriage contract, even if they have been stipulated reciprocally.

[1] An application to a Court to prove impotence, by means of expert examination with a view to a declaration of nullity, has been decided by the Turin Cassation (Ap. 1, 1891) not to amount to a grievous insult on the wife's part.

[2] The "dotal profits," translated "portion of the survivor," are concessions made in the marriage contract by one party, at whose death they are to take effect in favour of the other, if surviving.

[3] The "marriage contract" is a deed executed before a notary public previously to the marriage, fixing the proprietary relations of the parties.

If the separation is decreed owing to the fault of both parties, each of them incurs the above loss, but always retains the right to alimony in case of need.

157. The parties may, by mutual consent, put an end to the effects of the decree of separation, either by means of an express declaration or by the fact of cohabitation, without need of intervention on the part of the judicial authority.

158. Separation by consent of the parties alone may not take place without the ratification of the Court.

SCOTLAND.

[*Contributed by* JAMES S. HENDERSON, ESQ.]

The marriage law of Scotland, which has long formed a favourite subject for treatment in the realm of fiction, differs in several important respects from that of England, not only with regard to the mode in which marriage may be constituted, but likewise as to the grounds upon which it may be dissolved, and in placing the wife upon an equality with the husband when seeking divorce or judicial separation. If either husband or wife has been guilty of (*a*) adultery or (*b*) malicious and obstinate desertion for four years, the innocent spouse is entitled to claim a dissolution of the marriage. The grounds upon which a judicial separation will be granted are (*a*) adultery or (*b*) cruelty. It is competent for the party suing, when the ground of offence is adultery, to seek either a decree of judicial separation or one of divorce, the former remedy being, it is said, preferred in many cases by the wives of the poorer classes, inasmuch as a conclusion for aliment can be inserted in the petition, and the husband may be ordered to contribute to the support of his wife during their joint lives; whereas if, instead of seeking judicial separation, she obtains a divorce, she is thrown upon her own resources. Cruelty—the other ground upon which judicial separation may be granted—bears the same meaning in Scots as in English law.

There is no similar jurisdiction in Scotland to that exercised in England by Courts of Summary Jurisdiction and other Criminal Courts under the Summary Jurisdiction (Married Women) Act, 1895.

After a decree of separation *a mensâ et thoro* has been obtained at the instance of the wife, all property acquired by her while the separation lasts belongs to her as a *feme sole*, and if cohabitation is subsequently resumed, the property which she then has is held by her to her separate use; she is also rendered capable, while the separation lasts, of contracting, and is liable to be sued, as if she were a *feme sole* (Conjugal Rights Act, 1861, s. 6). This provision has, since the passing of the Married Women's Property Act, become of less practical importance. Under the same Act of 1861 a wife who had been deserted by her husband could apply for a protection order as regards her property, but this proceeding is now almost unknown (see Walton, *Husband and Wife*, p. 270).

DANGEROUS TRADES AND LEGISLATION.

[*Contributed by* THOMAS OLIVER, M.A., M.D., LL.D., F.R.C.P.; *Physician, Royal Infirmary, Newcastle-upon-Tyne.*]

Initiation of the Movement.—It was in the early part of last century that the attention of the English Parliament was directed to the necessity of improving the conditions of labour in factories so far as the employment of children was specially concerned. The year 1802 marks the rise of factory legislation in this country, when in a Bill entitled "The Health and Morals of Apprentices Act, 1802," Sir Robert Peel proposed a twelve-hours' working day for apprentices and the abolition of night work. The Bill passed. This was the first expression of interference on the part of the Government with the hours and conditions of labour in factories. Although only an extension of the Elizabethan Poor Law relating to parish apprentices and not a Factory Act in the proper meaning of the word, it was something in those days, even allowing that the Bill fell considerably short of the requirements of the time, to have succeeded in getting the limitation of hours recognised as a principle by Parliament. There was no great opposition to the Bill. It was in subsequent years when fresh legislation was attempted that there arose on the part of interested members of Parliament and manufacturers a growing distaste to legislative interference with the conditions of labour in factories and the restriction of hours for adults. It was not until 1833 that factory inspectors were appointed (four in number) and powers conferred upon them to enter factories at any hour of the day and to examine the workers. They could draw out certain regulations, one of the most notable of which, since it met with considerable opposition, is the fencing of all shafts. In this country, factory legislation has been very much a matter of experiment. It has proceeded piece-meal. As far back as 1864 certain trades were scheduled as *unhealthy*. Regulations were issued as regards ventilation. The removal of dust by means of fans was required by the Act of 1867 both in factories and workshops; children and young persons were forbidden to work in certain branches of white lead manufacture by the Act of 1878, while by the Act of 1883 special rules were framed for white lead factories generally. In 1893 a Departmental Committee was appointed by Mr. Asquith to enquire into and report upon the conditions of labour in white lead works. This Committee was composed of Mr. James Henderson,

H.M. Superintendent Inspector of Factories (Chairman); Messrs. E. Gould and Cameron, of the Factory Department, Home Office; Dr. Thomas Oliver (Newcastle-upon-Tyne); Dr. Dupré, Chemical Expert to the Home Office, and Mr. H. J. Tennant, then private Secretary to Mr. Asquith (now M.P.), as Hon. Secretary to the Committee. About this period other Departmental Committees were appointed to deal with the chemical trades, pottery manufacture, nitro-benzene, anthrax, etc. In 1896 the Dangerous Trades Committee was appointed by the Home Secretary. This Committee—composed of Mr. H. J. Tennant, M.P. (Chairman); Miss Abraham, Principal Lady Inspector of Factories, Dr. Thomas Oliver, and Commander Hamilton Smith, R.N., of the Factory Department, as Hon. Secretary—was invited to consider and report upon the "conditions of work as they affect the health of the operatives" in certain industries and processes. Twenty-three industries were named. The Committee sat for fully five years, when its final report was published. In some of the most urgent instances the Home Office issued special rules shortly after receiving this report, but in others, *e.g.* hand file cutting, owing partly to the peculiarly intricate character of the questions involved, it is only within the last year or two that some of the recommendations of the Dangerous Trades Committee have been given effect to.

Since the publication of this report other Departmental Committees have been appointed to enquire into and report upon various industries. To these Committees such enquiries as the following were entrusted: Work in cotton mills and humidity; causes and prevention of explosions in coal mines; use of phosphorus in the manufacture of lucifer matches; use of lead in pottery manufacture; miners' phthisis and ankylostomiasis, etc. Persons known to have special knowledge of the subjects requiring to be treated were chosen to assist the Home Office in collecting information and suggesting regulations. Of the medical men who have assisted in these enquiries, mention may be made of Drs. Prosser White, Ransome, Haldane, and Whitelegge. The services rendered to the various Committees by Prof. T. Thorpe of the Government Laboratory have been invaluable. By this means factory legislation has been facilitated.

Powers of the Home Secretary.—The Act of 1901 confers powers upon the Home Secretary whereby he can extend his regulations without appealing to Parliament whenever in his opinion certain trades are believed to be dangerous or injurious to health or limb. He may by regulations prohibit the employment of, or modify, or limit the period of employment for all or any class of persons engaged in dangerous processes. It is incumbent too on medical practitioners to notify to the Chief Inspector of Factories all cases of industrial lead, arsenic, phosphorus and mercurial poisoning, and anthrax, and for each notification received a fee of *2s. 6d.* is paid by the Home Office. By this means not only is the attention of the Home Office early drawn to the existence of industrial poisoning, and

the opportunity provided for adjusting defects of machinery or ventilation, but there is being accumulated a vast amount of information, statistical and other which will be of invaluable service.

As it is impossible in a paper of this length to deal with most of the dangerous trades, I will select one or two of the most important and show what legislation has effected for them both at home and abroad, but particularly in France.

Examples of Dangerous Trades: Lucifer Matches.—The manufacture of lucifer matches and wax vestas is an important industry, although the number of persons employed in the trade is not large. Matches are cheap, except in France, where their manufacture is a State monopoly. It is the smoker who is specially catered for and whose requirements receive the greatest consideration. A larger consumer than the householder, he insists upon receiving a match that will strike anywhere with a certain crispness and sharpness of sound. These qualities are generally obtained by using white or yellow phosphorus and potassium chlorate. The other ingredients present in the heads of matches are powdered glass, glue, and colouring matter. Yellow phosphorus is extremely poisonous. Less than a grain when swallowed has caused death. In the dark, phosphorus is luminous owing to oxidation of the metalloid. The fume which is given off is composed of phosphorous and phosphoric oxides. It is the fume which, when inhaled, has proved injurious to the health of lucifer match makers. The so-called "safety" matches strike only upon a prepared surface which is fixed on the box, and which contains red or amorphous phosphorus. This form of phosphorus is, practically speaking, non-poisonous. Matches prepared in this way when they fall upon the ground and are trampled upon do not ignite. They are safety matches, therefore, not only as regards being non-poisonous, but as regards risk from fire. Until recent years only these two kinds of matches were before the public. Matches that will strike anywhere and which are non-poisonous are now made from sesquisulphide of phosphorus. This is a French invention. It gives on the whole a fairly serviceable but not such a good match as that made from yellow phosphorus.

The lucifer match industry as we know it has only existed for about three-quarters of a century. The invention of the match is claimed by several countries. In England it is believed that lucifer matches were first made in Stockton-on-Tees. On the Continent in 1831, Charles Sauria, a student at Dôle and subsequently a medical practitioner at Saint-Lothain in the Jura, is said to have been the first to have made matches containing white phosphorus, potassium chlorate, and sulphur. Kammerer of Wurtemburg obtained the secret and improved upon Sauria's methods. So, too, did Stephen Römer, a merchant of Vienna. From the year 1830 the Austrian manufacturers occupied for a period the prime position: they controlled the export markets. It requires very little capital to start a lucifer match factory. In consequence of this, both at home and abroad all kinds of

tumble-down buildings have been used as match factories. Small wonder, therefore, that, as the industry was carried on under the worst possible conditions, phosphorus necrosis should have occurred in the workers. It was in 1838 that Dr. Lorinzer of Vienna concluded that the diseased jawbone of a female lucifer match maker named Marie Jankovitz was the result of exposure to phosphorous fumes. This announcement and the report of other cases similarly lodged by Dr. J. Knolz upon the health of matchmakers attracted the attention of the Austrian Government and resulted in the appointment of a special Commission to enquire into the subject. Although Lorinzer is usually considered to have been the first to have drawn attention to necrosis of the jawbone in matchmakers, Bibra and Geist of Erlangen as far back as 1827 had, in their book dealing with the diseases of workers in match factories, given an accurate description of phosphorus necrosis. A few years after Lorinzer's report the malady was observed in matchmakers in England by Wilkes (now Sir Samuel). Phosphorus necrosis is an extremely painful affection: the disease often lasts for several years, when a larger or smaller piece of bone is exfoliated or there is developed secondary inflammation of the membranes of the brain, which is invariably fatal. In addition to the necrosis of the jawbone, known in this country as "phossy-jaw," and in France as "mal chimique," the patient runs the risk of developing a subacute form of septic lung disease which may terminate in phthisis, or, his health becoming enfeebled, he becomes anæmic and the subject of albuminuria.

Phosphorus Poisoning: British and Foreign Legislation.—In every country where lucifer matches have been made from white or yellow phosphorus, ill-health and much suffering have been experienced by the workers. In Great Britain during the last twenty-one years there have been notified one hundred and five cases of phosphorus necrosis, with nineteen deaths. It is not maintained that in these figures all the cases are included. In consequence of the suffering caused by phosphorus necrosis, each country in Europe has tried to vary its methods of manufacture so as to mimimise the risks to health. At first it was thought that the disease was a consequence of the high percentage of phosphorus present in the paste, and that if this was reduced good results would follow. In England the amount of phosphorus in match-heads has seldom risen above 5 per cent. Belgium passed a law whereby the percentage was not to be above 8, and Holland, after insisting upon 5 per cent., subsequently passed a law in 1901 prohibiting the manufacture of matches from white phosphorus and discouraged also the sale of such. In this action Holland was following the step which Denmark took fully twenty years ago, when she interdicted the manufacture of white phosphorus, also the manufacture and sale of ordinary strike-anywhere matches. Norway and Sweden are large makers of matches. They produce large quantities of safety matches, but mostly for export purposes, for in the home market ordinary strike-anywhere

matches are mostly consumed, and as a consequence phosphorus necrosis is not unknown in these countries. In Germany and in Austria-Hungary phossy-jaw has been of frequent occurrence. In 1879 Switzerland passed a Bill prohibiting the manufacture of matches from white phosphorus. The peasantry thereupon began to make lucifer matches in their homes, and as a sequel to this clandestine industry there broke out quite an epidemic of phosphorus necrosis in the various cantons. At no period did the number of cases of phosphorus necrosis in Britain reach higher than 1 per cent. of the workers engaged in dangerous processes, but in Switzerland the numbers rose as high as 3 per cent. on one occasion, and in France to 2 to 3 per cent. It was this large amount of sickness among the workers in France and their heavy claims for compensation that forced the French Government to ascertain whether a strike-anywhere match could be made that would possess all the advantages of those made from white phosphorus but without their danger to health. England manufactures more white phosphorus than any other country. She supplies the smaller European markets. Oldbury, near Birmingham, is the seat of the manufacture. Phosphorus is made from bones. Since 1869, owing to the scarcity and higher price of bones in Germany consequent upon their use in the manufacture of beet sugar, phosphorus has largely ceased to be made in that country; and the same remark applies to Austria-Hungary. Russia makes her own phosphorus. England a few years ago manufactured 1,750 tons a year and Russia 189. At Philadelphia, United States of America, there is produced annually 18 tons. The total production of white phosphorus in the world is estimated to be 5,000 tons, of which the German Empire consumes about 1,200. As white phosphorus is manufactured in enclosed vessels, there have been, comparatively speaking, few cases of phosphorus necrosis in men employed in the works.

Number of Persons Employed in the Trade.—The following table taken from *Les Industries Insalubres*, p. xxv., conveys some idea of the number of persons employed in lucifer match works in the various countries. Many of the factories are extremely small, and give employment to very few hands.

	Date of Enquiry.	Number of Factories.	Number of Workers.
Austria	1900	56	4,349
Belgium	1895	14	2,491
France	1901	6	2,050
German Empire	1895	122	4,805
Great Britain	1901	24	4,152
Hungary	1902	18	2,715
Japan	1902	29	18,088
Norway	1902	6	717
Russia	1899	134	15,500
Sweden	1901	20	6,507
Switzerland	1901	19	327

The composition of the paste for heading matches in the various countries is as follows:—

Belgium	7 per cent. of white phosphorus.
France	None.
Britain	5 per cent. or more of white phosphorus.
Hungary	5-12 " " " "
Japan	10 " " " "

The dangerous processes in a lucifer match manufactory are the preparation of the paste, the dipping, drying, and boxing of matches.

Opposition to the use of white phosphorus was first raised in Sweden, when Lundström of Jonkoping in 1856 invented the "Swedish" or "safety" match which only strikes upon the prepared surface on the box. These safety matches, made from non-poisonous red phosphorus, have never supplanted those made from the dangerous white. Consumers prefer the ordinary strike-anywhere match. If the use of white phosphorus is to be interdicted in any country, the prohibition must be looked at from the possible effects which such may have upon the home markets and the export trade of that country. The Swedish Parliament, for example, while in favour of prohibition, was obliged to give way upon this subject.

Phosphorus necrosis spares neither age nor sex. At an early stage in the manufacture of lucifer matches legislative measures were undertaken to secure safety. The Canton of Zurich was about the first to make a move in this direction. This was in 1847. In Prussia regulations were drawn out in 1857, in the Canton of Berne in 1864, and in Sweden in 1870. The Factory and Workshop Act, 1878, contained regulations for the industry in England. Germany followed in 1884, Austria 1885, Belgium and France 1890. Although the regulations of all these countries have much in common, still there are differences. Young persons are protected to eighteen years of age. In some countries the percentage of phosphorus allowed in the paste is restricted by law. Since 1874, Denmark, as already stated, has prohibited the manufacture, importation, and sale of ordinary phosphorus matches. Switzerland followed in 1879, but after trying the experiment of prohibition for a year and a half, the Act was suppressed. Later on a fresh Bill was introduced and passed in 1898. In 1901 Holland interdicted the use of white phosphorus, and since 1898 France has forbidden the employment of white phosphorus, so that at the present time all the matches in that country are made from the harmless sesquisulphide of phosphorus.

I have been occasionally asked the question whether the air outside a match factory is rendered harmful to people residing in the district by the escape of phosphorous vapour? This subject I have discussed with managers and workers both at home and abroad. There is nothing to show that bad effects have followed. Another question of equal importance is whether

workers in match factories are entitled to compensation in the event of disease. In other words, is phosphorus necrosis an accident? France formerly admitted the claims of the workpeople and compensated them, but since the introduction of the sesquisulphide match the necessity for compensating workpeople no longer exists. There is no necrosis. In England phosphorus necrosis is not regarded as an accident.

Lead and its Compounds.—Metallic lead can scarcely be regarded as a cause of poisoning compared with its compounds, such as the carbonate and oxide. The carbonate constitutes what is known as the white lead of commerce (French *ceruse*) and the oxide is called litharge. In England lead miners do not suffer from plumbism, but at the Broken Hill Mines in Australia lead poisoning is frequently met with among the men, owing to the ore existing largely in the form of carbonate. Lead enters into a considerable number of our industries one way and another. It is an extremely subtle poison. The persons who suffer most from industrial plumbism are workers in white lead factories, colour mixers and grinders, pottery makers, house and ship painters, electric accumulator makers, etc. Space will not allow me to enlarge upon the trades in which lead and its compounds are employed. In several Blue Books presented to the Home Secretary the subject of industrial lead poisoning is dealt with. One of the recent reports is that by Professor Thorpe and myself, upon the use of Lead Compounds in Pottery Manufacture, in which, among other things, is recommended the use of leadless glazes. The rules for lead workers are pretty much the same in all countries; they are personal cleanliness on the part of the workers, provision of baths and washing appliances by the employers, ventilation of the workrooms, no meals to be taken into the factories, washing before eating, wearing of respirators in dusty processes, the prohibition of smoking and chewing tobacco when at work. In England female labour is prohibited in such of the dangerous processes of lead carbonate manufacture as the emptying of white beds, and the drying and packing of white lead. To some extent I am responsible for the abolition of female labour in white lead works. Although for a period labour was dislocated by this in the factories and the cost of production increased, the results are now admitted to be most satisfactory from the saving of life that has taken place in the trade, while it is also acknowledged by the employers that the cost of production has not after all been materially raised. All cases of industrial lead poisoning must be notified to the Chief Inspector of Factories. In Britain house-painters do not come within the scope of the Factory Act. As they contribute very largely to swell the number of cases of plumbism, and are yet not compulsorily notifiable, it is difficult to state accurately the amount of lead poisoning that takes place among painters, although everything points to plumbism increasing among them. The malady is equally well known on the Continent too. In Leipzig for the first six months of 1902, out of 578 painters there were 92 cases of

sickness, of which 13 were plumbism; and in Dresden for 1901, out of 865 members of the Union, there were 178 cases of illness, of which 71 were due to lead poisoning. According to the returns of the painters' sick fund in Berlin, the numbers of cases of lead poisoning declared and indemnified were for

1893	1894	1895	1896
2,511	1,797	1,711	1,696

and if we take the proportion of cases of plumbism per 4,000 workmen, they world be 250, 241, 222, and 271 for the above years respectively. With high indices like these and the drain upon sick funds, numerous efforts have been made to find, if possible, a substitute for white lead. In France zinc white is recommended for painting public buildings, and an attempt is being made to render illegal the use of white lead in house-painting. In the matter of dangerous trades the French Government was formerly aided by the Académie des Sciences, but latterly a new body—le Comité Consultatif des Arts et Manufactures—has undertaken to prepare a list of the dangerous trades, to draw out rules for unhealthy occupations generally, and to give all such assistance as it possibly can. Although factory legislation of a kind existed in France as far back as the first decade of last century, it was in 1841 that the attention of the legislature was for the first time directed to the dangers to health and risk to life to which work-people were exposed in unhealthy occupations, and even then the Government approached the subject with a good deal of timidity.

Factory Legislation in France.—As regards unhealthy industries, the law in France makes a fundamental distinction between harmful causes which act *externally* to, and those whose effects are felt solely *within* factories. This distinction has led up to two different lines of legislation, since the external effects are not the same as the internal. Emanations from a factory may be a nuisance to a neighbourhood and yet the particular manufacture may not be hurtful to those employed thereat. The manufacture of stearic acid, for example, is a source of annoyance to people living in the environs of a factory, owing to the unpleasant odours of fat liberated, but the trade is quite inoffensive to the worker. In white lead factories, on the other hand, in which there is great danger to the worker, there is little harm to the people outside so long as the smelting of lead is not carried on. In France we therefore find two lines of legislation running side by side: (1) legislation dealing with the effects of factories and workshops upon neighbourhoods, and (2) legislation dealing with the hygiene and safety of the workers.

As regards legislation dealing with factories and workshops and the harm these factories do to neighbourhoods, it may be said that as far back as 1803 the Minister of the Interior invited the Institute of Sciences to

draw out regulations for such. This was supplemented in 1809 by the appointment of a Commission which reported to the Conseil d'Etat, the main points in whose report were that factories which allowed harmful materials to escape into the air ought to be divided into three classes: (1) factories which ought to be at a considerable distance from all dwelling houses; (2) factories where this is not necessary, but yet in whose process of manufacture the escape of harmful products must be avoided; and (3) factories which may remain in close connection to dwelling-houses without inconvenience. Certain trades were scheduled as dangerous in accordance with the above, but the list of industries has been altered from time to time owing to new inventions on the one hand, and improvements in methods of manufacture from the hygienic point of view on the other.

It was in 1811 that the attention of the French Government was directed to the risks to health and sufferings of persons employed in dangerous trades. At first legislation only dealt with child workers. No child was to be allowed to work before eight years of age, nor was he to work longer than twelve hours a day. The trades at which children could work were scheduled. In 1841 an attempt was made in France to follow the English factory legislation of 1833. In 1874 the age of young workers was fixed at twelve, and in order to see that the law was given effect to fifteen factory inspectors were appointed. By the Factory Acts, 1892–3, the age of child workers was raised to thirteen years and the working day limited to eleven hours, subsequently to ten and half hours and then to ten in 1904, since which the length of the working day in France is the same for women and men who are employed in the same factories as children. A medical examination is imposed upon all young workers, so as to test their physical fitness. The employment of women and children can by law be prohibited in any industry that is known to be dangerous. A list of these trades is published from time to time. In France at the present time there are eleven factory inspectors for the various departments into which the country is divided, ninety-one sub-inspectors, and nineteen lady inspectors who visit workshops where only women are employed. All the reports concerning the health of women and children are dealt with by a Committee appointed by the Minister of Commerce and of Industry. The chairman of this Committee furnishes an annual statement to the President of the Republic, So far as the hygiene and safety of adult male workers are concerned, these are reported upon direct by the Minister of Commerce and Industry to the head of the State. All general questions relating to the application of the factory laws, all decisions regarding their administration, and all innovations which have for their object the care of the health of the workers are discussed, elaborated, and reported upon to the Minister by permanent Committees. It is thus that the Commission d'Hygiène Industrielle co-operates with the Comité Consultatif des Arts et Manufactures, while another body, the Conseil Supérieur du Travail, is employed in studying the

general conditions of work and the interests of the workers in the various industries. French law does not hold employers responsible for industrial diseases contracted by workers engaged in unhealthy trades. The affected workman can always make a claim under common law. An effort is being made to place industrial diseases on the same plane as accidents, but in France, as in England, it has been found difficult to define industrial disease. What constitutes an accident is the possibility that we can usually assign an origin and a determinate date to it, but industrial diseases, with the exception of anthrax, are often slow and insidious in their development, and therefore do not come within the benefits of the law unless negligence can be shown on the part of the employer.

NOTES.

The St. Louis Universal Congress of Jurists and Lawyers.—The editors are indebted to the kindness of Mr. Justice Kennedy for the following notes :—

"The recent Congress of jurists and lawyers at St. Louis was the occasion of much interesting and most agreeable intercourse between many members of the profession of the law from many countries, and of some valuable discussion of important topics. The work of Mr. Justice Brewer, of the Supreme Court of the United States, as President of the Congress, and of Mr. Justice Nesbitt, of the Supreme Court of Canada, as Chairman of the Committee of Nations, was admirably done. It would have been unreasonable to look for the attainment of immediate practical results. That was impossible for many reasons.

"The manifold attractions of the magnificent Exhibition, and the splendid and genial hospitality of the entertainment, public and private, provided for all comers to the Congress, drew together, no doubt, a much larger gathering than would otherwise have assembled; and, in regard to the American lawyers, who, of course, formed the bulk of the delegates to the Congress, the fact that the sittings of the Congress immediately followed the annual meeting of the American Bar Association at the same place naturally served to increase the number present. But, if the charms of the place and the surroundings drew a large attendance, they necessarily tended also, in combination with extraordinarily hot weather, rather to divert attention from serious intellectual exertion indoors; and the spaciousness of the Festival Hall in which the sittings were held, and which had been specially constructed for the comfortable enjoyment by a vast multitude of the music of a colossal organ, caused to the comparatively small audience considerable difficulty in hearing the speakers, and exercised a somewhat chilling influence over debate. The distance of St. Louis from Europe presented an insurmountable obstacle to the adequate representation of countries other than the United States. And lastly, for the achievement of direct and definite results from the discussion of the large and weighty subjects submitted to the Congress, the time given—parts of two days and a half—was too short. In view of the total time, and the numerous requirements of routine and incidental business and of general discussion, the limit of one hour which was imposed upon each of the four principal addresses was right and proper;

but, certainly, in three cases at least it was, in regard to the greatness of the subject, too narrow, and in one case—viz., the very valuable address of General Foster on the Promotion of the Settlement of International Controverseries by Resort to The Hague Tribunal or Reference to Special. Commissions—the speaker was obliged by the time limit to omit a considerable portion of the matter which he had prepared. In truth, the whole time of the Congress might well have been occupied by the discussion of this paper, and of the paper which was read by the Hon. G. A. Finckelburg on the important subject of the exemption of private property at sea, whether belonging to enemies or neutrals, from capture by belligerents, and which occasioned the best of all the debates, including a concise and witty speech of Mr. Robertson, the only English barrister who addressed the Congress.

"It would be altogether wrong, however, to infer that fruitful work was not done, because the Congress may be unable to point to direct results, in the sense of the solution of any of the questions of international interest which were before it, or to any definite pronouncement of opinion by a representative assembly. The contact in free and friendly intercourse of many legal experts of influence and repute from many lands, and the personal interchange between them of ideas on some of the grave questions to which the world's welfare demands a right answer, must make sensibly for good—they must, at least, promote, with peculiar effectiveness, the spread of valuable knowledge, the dissolution of national prejudices, and the improvement and the unification of legal systems." Assuredly the labour so skilfully and ungrudgingly spent by its authors upon the St. Louis Congress will not have been labour lost.

The Centenary of the French Civil Code.—The editors are indebted to Sir Courtenay Ilbert for this account of the interesting proceedings on the above occasion: "The centenary of the French Civil Code was celebrated at Paris during the last days of October. It was initiated by two learned societies, the Société de Législation Comparée and the Société d'Etudes Législatives, and was organised by a committee representing judicial corporations, legal officials, faculties of law, and other learned bodies, and presided over by M. Baudoin, Procureur-Général à la Cour de Cassation, and President of the two initiating societies.

"Two private business sittings, held on October 27th and 28th, were devoted to a discussion of the lines on which the revision of the code ought to proceed. It is understood that two volumes of preliminary studies had been prepared for the assistance of the committee in their discussions, and the result of their deliberations will be anxiously awaited by all who are interested in scientific legislation. They will have to consider how far and by what methods it will be possible to adapt to the requirements of the twentieth century a body of legal rules, which were mainly drawn from the writings of Pothier and other eighteenth-century jurists, and which, while the social and economic conditions which they were intended to

mee: have been revolutionised, have substantially remained unchanged—a task of unexampled magnitude and difficulty, on which our verdict must be deferred.

"But to the public functions by which the centenary was celebrated unqualified praise may be given. They began on Friday the 28th with a formal reception of the delegates by the Municipal Council at the Hôtel de Ville. On the afternoon of Saturday a solemn sitting was held in the great amphitheatre of the Sorbonne. The President of the Republic honoured the assembly with his presence. M. Vallé, Garde des Sceaux and Minister of Justice, took the chair and delivered the first address. Other addresses were delivered by M. Ballot-Beaupré, first President of the Cour de Cassation, by M. Glasson, Dean of the Faculty of Law in the University of Paris, by M. Bourdillon, Bâtonnier of the Order of Avocats at the Court of Appeal, and by M. Lejeune, Minister of State in Belgium. The palm-leaved coats of Academicians, the star-bedecked and gold-laced uniforms of diplomats and other high officials, and the crimson robes of the judges formed a brilliant show on the daïs, whilst the floor and galleries of the huge building were crowded by an interested and attentive audience. The irregular intervention of a lady who denounced the code as unjust to women and demanded cheers for '*le bon juge Magnaud, qui n'applique pas la loi*,' relieved the gravity, but did not materially disturb the order of the proceedings. In the evening there was a great banquet at the Palais d'Orsay, with more speeches, and the festivities were terminated on Sunday evening by a musical soirée given by M. and Mme. Vallé at the Chancellerie in the Place Vendôme. The centenary was attended by representatives of all the countries of Europe, including those which have not adopted the French Civil Code as the base of their law. Among the English guests were Sir Edward Fry, Sir Frederick Pollock, Sir Courtenay Ilbert, and Mr. M. D. Chalmers. The vast number of visitors who availed themselves of the invitations sent out by the organising committee must have severely taxed the resources of the committee and their staff, but, thanks to the energy and organising capacity of Professor Lyon-Caen and others, they acquitted themselves of their difficult task with conspicuous success. Nothing certainly could have exceeded the kindness and hospitality with which the English guests were received."

The Scottish Free Church Decision and its Results.—The following note, being from the authoritative pen of Mr. A. Taylor Innes, advocate, Edinburgh, possesses a peculiar value: "This decision, of which an anticipatory notice will be found in our last number (p. 493), was pronounced by the House of Lords on August 1st. The case had been heard as far back as December, but the death of Lord Shand during the spring vacation was understood still to leave a serious division of opinion on the Bench, and Lord James of Hereford and the Chief Justice made up a Court of seven for the rehearing in June. In the end Lord Macnaghten and Lord Lindley,

dissenting, held (with all the Scottish judges) that the Free Church of Scotland had in its constitution power to revise its doctrinal standards so far as to permit of the union in 1900 with the United Presbyterian Church—a union which left establishment or voluntaryism an open question. The Chancellor, however, with Lords Davey, James, Robertson, and Alverstone, decided otherwise, and a great sensation was created in Scotland by the handing over of the property and accumulations, religious, missionary, and academical, of the Church of 1843 to a small Highland minority numbering in the last General Assembly only twenty-seven men against 643.

"Surprise has been expressed that there was not a trust deed in this case. But in point of fact the Free Church prepared one in 1843, and it apparently provided for Church unions and splits. It had been intended that this deed should be tried as a separate defence in a second case before the Court of Appeal, but for some reason the Dean of Faculty, for the United Free Church, declined to plead the express power given, and fell back on the more metaphysical question of Church identity apart from such explicit provision. Still more disappointment was felt on another ground —that the contest was not settled in the higher Court on the alternative proposal originally put by the pursuers, that they should get their share of the property *pro tanto*. But at the re-hearing they wisely declined to press this equitable alternative, and, refusing an offer of fifty thousand pounds, which would have covered it, gained an award of several millions, by a judgment the law of which is in itself of international interest, while its immediate results may claim the attention of the Legislature.

"1. The decision reversed the unaminous finding of the Scottish judges. But it is not without support in the precedents of the last century even in Scotland. These, however, were in their turn based upon the ruling of an earlier Chancellor, Lord Eldon, whose decision in a case which lingered in his Court for twenty years (*Cragdallie*) has ever since been a landmark, and also a stumbling-block, in the Presbyterian north. In Scotland there is no law of charities separate from the general law of trusts, and the law of trusts there is remarkably free from technicalities and arbitrary presumptions. The Courts there, too, are not entitled to interfere with and regulate the administration of charitable and religious funds any more than that of private executorships. And they are of course familiar with the phenomenon of democratic Christian Churches uttering and revising and re-revising their creeds from time to time, generally with the most conservative caution at each particular step, but with large results for conscience on the whole. The House of Lords and English lawyers generally are not familiar with this 'autonomy' (all the Presbyterian Churches speak habitually of 'legislation' in Church matters as part of their proper work), and have difficulty in fitting it into the framework of their law of trusts. In the present case the Court of Appeal has refused to accept this claim in the case of the Free Church of Scotland, and, apart from its immediate effect

in North Britain, the judgment is regarded as hostile by the communions which call themselves 'Free Churches' generally on both sides of the Atlantic. The comparison with American law will be especially interesting, for Presbyterian bodies hold a great place among Free Churches there, and the law of the States has taken over English ideas as to trusts in a way which that of Scotland has never done. Yet in practice, American law concedes full autonomy to the Churches which it recognises. This may be partly due to the civil 'societies' or corporations which it interposes between the Churches proper and the law. But in any case the result is that the autonomous Churches are not only tolerated by the law, but work well within its framework—American jurisprudence recognising the decision of the Church Courts as conclusive on 'controverted matters of faith,' and allowing Church funds to follow that Church decision. Of course, where the donor has expressly specified the application of any fund, the result is otherwise. But in the ordinary case the law there recognises the Church judicatory—certainly the Presbyterian Church judicatory—as the proper and competent authority in internal Church matters; and has even described an appeal from such a judicatory to itself as 'an appeal from the more learned tribunal in the law which should decide the case to one which is less so' (*Watson* v. *Jones*, Wallace's Supreme Court Reports, xiii. 729). Within the last three years accordingly the chief Presbyterian body in North America has revised its whole Confession on Predestination and the other doubtful points, just as the Free Church in Scotland and our Colonial Churches have done; and the law of trusts has interposed no obstacle whatever.

"2. But it is possible that the *results* of the late decision may concentrate Parliamentary attention on this part of our law without delay. There is at least every appearance of the failure and collapse of the particular trust this year set up. The successful Church had less than thirty congregations supplied with ministers, while its opponents had eleven hundred (on its Free Church side alone), besides three powerful theological colleges, and missions throughout the world. Yet the small successful minority are now called upon to work a Church trust some thirty times too big for it. And the only body outside which can help them in this emergency is that which this judgment specially incapacitates, and which in addition has promptly accepted the disability. So far as is known, not one of the twelve hundred ministers has left the United Free Church since August 1st: even the missionaries in India and Africa have unanimously adhered to the twice disestablished communion. Still more significant is the fact that the smaller body at its public Commission of Assembly had no suggestion for ultimately fulfilling the trust, on the principle of *cy-près* or otherwise. And their only proposal for even postponing the dead-lock was, that the very body which has been deprived of the property should in the meantime accept nine-tenths of the work—an acceptance which might be as difficult legally (without Parliamentary intervention) as it is

ecclesiastically. It seems a hopeless *impasse*; and if we are to judge by the views of the Archbishop of Canterbury and Lord Balfour of Burleigh, and by one weighty utterance of Lord Davey, it must in some form engage the attention of the Legislature. It does not follow that this ought to be in the form of an amendment of the general trust law. Most Scottish lawyers indeed think the law should be widened so as at least to include their autonomous religious societies, with power of continuous development. But that might be a large enterprise; and it is desirable to avoid all appearance of reversing any law recently laid down. What is urgently needed is to prevent the mere ruin and dilapidation of a great religious trust, which would be accompanied with immense personal suffering, and no gain to any of the lieges. And to prevent such a result—a result which the supreme judicial tribunal certainly did not intend, but may have no longer power to avoid—is certainly within the occasional duties of a legislature. Its larger duty—of comparison of jurisprudences and amendment of its own general law—may be performed more wisely and more leisurely after this wreck is cleared away from its threshold."

Imperial Organisation and the Privy Council.—Sir Frederick Pollock's recent letter and statement in *The Times* on Imperial Organisation shows how opinion is shaping itself to definite conclusions on this important and difficult problem. The value of the statement consists not only in what it discards, but in what it suggests, and it carries even more weight from the fact that Sir Frederick is speaking on behalf of a strong though unnamed body of competent opinion. After negativing as impracticable schemes for Colonial representation in the home Parliament, a Federal Parliament, or a reconstructed House of Lords, Sir Frederick proceeds: "There remains one organ of our national Constitution which is still capable of being adapted to new functions. This is the Privy Council, of which the Cabinet itself is an informal committee, and from which several State Departments, including the ultimate Court of Appeal for all parts of the Empire except the United Kingdom, have derived their authority, however much that authority has been confirmed and remodelled by Acts of Parliament. It seems that, if an effective addition to the Councils of the Empire is to be made, we must look to the Privy Council to supply the machinery for it; and, in fact, sundry proposals of this kind have already been formulated in outline. They do not include any suggestion of creating new executive or compulsory powers. The object is not to diminish in any way the responsibility of Ministers to Parliament, nor to commit the Government of any Colony to anything to which it has not specifically assented, but to provide security for decisions affecting the general interests of the Empire being arrived at with the fullest information. No merely departmental committee would attain this object. The precedent of the Council of the Secretary of State for India is valuable as showing that a Council of specially competent persons is not necessarily insignificant because its powers are

only advisory; but in other respects it is not an adequate one. Two distinct plans have been put forward. One is the formation of a Committee of the Privy Council for Imperial affairs, including the best possible representatives of Colonial knowledge and opinion. The other is the reinforcement of the Cabinet by summoning Colonial Premiers and other specially qualified persons to attend its meetings as the nature of the occasion may require—a course for which constitutional precedent is not wanting.

"There does not appear to be anything inconsistent in these two proposals. Indeed, they may rather be taken as completing one another. If an Imperial Committee of the Privy Council were in existence, and possessed of the confidential information that such a body would naturally acquire, the persons who could be most usefully summoned to meetings of the Cabinet for special purposes would be members of that Committee.

"The presence of such persons from time to time at Cabinet Councils would be the readiest and safest way to acquaint the Cabinet with the opinions of the Imperial Committee, and would make it possible, so far as desired, to dispense with any written record of highly confidential communications. The Imperial Committee, however (or Council, if that name should be preferred), would have to collect and preserve a good deal of material. This need not all be of a confidential kind in itself (though some of it would be), nor very difficult of access; the point would be to have it at hand, kept up to date, vouched for by the best authorities as practically complete, and in such order as to be readily accessible, at short notice if required, for the use of the Cabinet, or, in the first instance, of the Department specially concerned. For this end, and for conducting a correspondence which might become large, the Committee would require a secretarial staff, whose members would belong to the permanent service of the country. That staff might be specially attached to the Prime Minister, as the head of both the Cabinet and the Imperial Committee. Some of us think that such an Imperial Committee and its secretariat might, in course of time, fill an important place in our Constitution, as a body including responsible representatives of the chief members of the Empire, and yet having a continuity putting it above party changes. This, if it came about, would only be by the institution giving proof of its utility. Meanwhile the experiment might be begun on a modest scale; if it failed to justify itself, no harm would have been done. At the very worst the negative experience obtained would be or some value. If, on the other hand, it succeeded, the results might be greater than any man now living can forecast.

As the object of the proposed Committee will not be to decide matters by a majority of votes, but to bring together in an advisory Council representatives of the different parts of the Empire, it will not be necessary or desirable that its constitution should be of a rigid character. There should be delegates summoned to attend regularly on the recommendation of each of the great self-governing States of the Empire, but the Prime Minister, or

any other Minister of any Colony, could be invited by the President of the Committee to attend meetings; and so also could Ministers of the United Kingdom whose assistance might be required for the discussion of any particular question. The Governments of India and of the Crown Colonies might be sufficiently represented by the Secretaries of State for India and the Colonies. The Prime Minister of the United Kingdom would naturally preside at the meetings of the Imperial Committee. The existence of ocean cables and the increasing rapidity of mail communications would make it easy for the representatives of the Colonies to keep in constant touch with their Governments, and to consult them on all important occasions, so that the Committee would virtually consist of the different Governments in consultation. The questions which would come before the Imperial Committee (or Council) would be those relating to foreign and commercial policy, and the numerous matters in which it is desirable that organisation and legislation in different parts of the Empire should be of a harmonious character—*e.g.*, merchant shipping, copyright, naturalisation, admission of aliens, marriage, etc. The power of the so-called Imperial Parliament to legislate for the entire Empire, while alive in theory, is largely dead in practice. If, therefore, any unity of action is to be maintained, it is necessary to have machinery for bringing the self-governing States of the Empire together in council, with a view to co-ordination of their action in matters where co-ordination is desirable."

It will be interesting to see how the scheme commends itself to the great States and Colonies of the Empire. If such a Council is to be a living power, it must grow out of a cordial co-operation.

The Cabinet and the Empire.—With reference to the paper on this subject by the Right Hon. R. B. Haldane, K.C., M.P., which appeared in vol. v. of the Journal, it should have been stated that the paper was published by the kind permission of the Royal Colonial Institute.

Husband Stealing from a Wife.—Mr. J. Pawley Bate sends us the following interesting note as to the adoption of the English Married Women's Property Act, 1882, in different parts of the Empire:—

"In *The Times* of October 19th, 1904, a strange case is reported. A man was indicted at the Central Criminal Court in London for stealing money from his wife, to whom he had been married under the law of Victoria: no evidence was adduced to show (as was the case) that the matrimonial *régime* concerning property which prevailed in Victoria at the time of their marriage was similar to that set up by the English Married Women's Property Act, 1882, and the Common Serjeant, applying the Common Law, ordered the prisoner's acquittal. In *The Times* of October 20th, a letter was printed, which the Acting Agent-General of Victoria (Alfred Dobson, Esq.) had addressed to the editor, pointing out that in 1890 (*i.e.*, before the date of the prisoner's marriage) the legislature of Victoria had abolished the Common Law as to married women's property for that colony.

"Here, surely, is a striking illustration of the importance of a fuller acquaintance on the part of lawyers in this country with the course of legislation in other parts of the Empire; and the inconvenience, not to say danger, which may attend its neglect.

"The following list indicates the date at which various parts of the Empire have adopted the principles of the English Act of 1882 concerning the proprietary relations of husband and wife:—

"(i) *North America:* Upper Canada, 1884; Nova Scotia, 1884; New Brunswick, 1895; Prince Edward's Island, 1896; Manitoba, 1881[1]; North-West Territories, 1890; British Columbia, 1888.

"(ii) *West Indies:* Bahamas, 1884; Barbados, 1891; Grenada, 1896; Jamaica, 1886; Leeward Islands, 1887; Bermudas, 1901.

"(iii) *Australasia:* New South Wales, 1893; Victoria, 1890; Queensland, 1890; South Australia, 1883-4; West Australia, 1892; New Zealand, 1884; Tasmania, 1883.

"(iv) *Gibraltar:* 1885.

"(v) *Straits Settlements*, 1902.

"In the island of Trinidad the rules of the Common Law on the subject still apply; this is because in 1844 a local Ordinance (No. 14) expressly substituted them for the rules of the Spanish law. The Ordinance in question is accordingly a lengthy statutory version of the English Common Law with regard to the proprietary relations of spouses *inter se*.

"The Common Law still operates in this matter in Hong Kong.

"If in any other part of the Empire the Common Law on the subject is still in force, it has escaped the writer's search.

"In the Act by which the Barbados legislature adopted the Married Women's Property Act, the word 'Property' was intentionally omitted from the short title of the Act; the consequence was that, when in 1896 that legislature adopted also the English Amending Act of 1890, the title of the second Act was ungallantly declared to be 'The Married Women's Amendment Act, 1896'!"

The New Servian Constitution.—M. Péritch, Professor of the Faculty of Law at Belgrade, gives some interesting particulars of the new Servian constitution. Among other things the right of public meeting—"réunion in plen air"—is fully recognised, subject to notice to the police, and the liberty of the Press is assured with even more solicitude. Not only is every citizen entitled to ventilate his ideas before the public, but this right of free speech cannot be controlled even by legislation. Yet—curiously—the new constitution does not go so far as the old in guaranteeing individual liberty. Under the new, a person sentenced to imprisonment by a Court of first

[1] The supersession of the Common Law in this particular seems to have begun in the years 1880-81 and it was practically abolished by Consol. Stat. No. 65 and Revised Stat. No. 95; but in 1900 an Act closely following the English Act was added to the statute book of Manitoba.

instance cannot appeal; under the old he might. The punishment of death by the old constitution was strictly limited to certain crimes; under the new it is left to the Legislature, with this reservation—that it cannot be inflicted for purely political offences. The most striking constitutional change is the abolition of the Senate, thus reducing the two chambers to one—"La Représentation Nationale." This M. Péritch regards with strong disapproval as favouring absolutism. At the same time the King's unrestricted right of veto on measures and his initiative are much curtailed.

In the matter of the judicial power, the provisions of the new constitution are more detailed and precise. The institution of trial by jury is guaranteed; three judges are made requisite for each Court; and the regulations for securing the irremovability of the judges and guarding the mode of their appointment are ampler in the new than in the old constitution. We shall look forward to M. Péritch telling us, later on, how it all works.

Sir Courtenay Ilbert on Montesquieu.—Sir Courtenay Ilbert's Romanes Lecture is a valuable help towards "placing" Montesquieu historically. Commenting on Montesquieu's great work—the *Esprit des Lois*—Sir Courtenay Ilbert says: "What, then, are the principles which after so long and painful a search Montesquieu ultimately found? In brief, they are these. The world is governed, not by chance, nor by blind fate, but by reason. Of this reason, the laws and institutions of different countries are the particular expressions. Each law, each institution, is conditioned by the form of government under which it exists, and which it helps to constitute, and by its relations to such facts as the physical peculiarities of the country, its climate, its soil, its situation, its size; the occupations and mode of life of the inhabitants, and the degree of liberty which the constitution can endure; the religion of the people, their inclinations, number, wealth, trade, manners, and customs; and finally by its relations to other laws and institutions, to the object of the legislator, to the order of things in which it is established. It is the sum total of these relations that constitute the spirit of a law. The relativity of laws—that is Montesquieu's central doctrine. There is no one best form of state or constitution; no law is good or bad in the abstract. Every law, civil and political, must be considered in its relations to the environment, and by the adaptation to the environment its excellence must be judged. If you wish to know and understand the spirit of a law, its essence, its true and inner meaning, that on which its vitality and efficiency depend, you must examine it in its relations to all its antecedents and to all its surroundings. This is the theme which Montesquieu tries to develop and illustrate in the course of his book." Along this path he—as Cowley finely says of Bacon—like Moses led us forth at last: the barren wilderness he passed—the wilderness of scholastic speculation—and

Did on the very border stand
Of the blest promised land,
And from the mountain-top of his exalted wit
Saw it himself and showed us it.

From the "relativity of laws" to the historical and comparative method is but a step. Montesquieu never perhaps quite made it; but life, as Cowley adds, is too short to discover worlds and conquer too. Montesquieu owes not a little of his popularity to the charm of his style. The charm is reproduced in this brilliant essay.

"Problems" for Egyptian Law Students.—In commenting on the teaching of law in Egypt in a recent report, the Judicial Adviser of the Khedive expressed regret that it was of so abstract and theoretical a character. The traditions of the French law schools prevail in Egypt, and the method of teaching by concrete cases has not hitherto found the favour there which it has in the United States, in Germany, and among ourselves. To redress the balance of theory and practice Mr. M. Sheldon Amos and M. Arminjou—who combine the qualifications of scientific and practical lawyers—have published a useful Collection of Problems and Exercises in the Civil and Commercial Law of Egypt—problems of property, of contract, of securities, of bankruptcy, of nationality, and many other topics—equally well adapted as subjects for moots or for solving in the study. Here is a typical example:—

"*Fraud.*—A. wishes to purchase the house of his neighbour B. and for a moderate price. As B. shows no disposition to sell his ancestral mansion for a moderate, or any, price, A. conceives the plan of directing his servant to throw stones at B.'s windows every night after dark. The house soon gets the reputation of being haunted, the tenants one and all throw up their leases and leave, and B. himself, who occupies an apartment, is compelled to decamp, as his wife threatens to return to her mother if he does not. In despair B. puts the house up for sale, and A., who has no rivals, easily purchases it at a derisory figure. As soon as the contract is signed A. goes about publishing the story of his successful manœuvre, being moved, not so much by vanity, as by the natural desire to restore the reputation of his house. B. sues him for rescission of the contract of sale."

The merit of the method—familiar, of course, for centuries in England in the moots and "bolts" of the Inns of Court—is that it obliges the student to apply abstract principles of law to a concrete set of facts, and to adjust such principles to one another; and he thus learns by degrees to seize the vital points of a case—the secret of all successful practice of the l aw.

Infants and Estoppel in Roman-Dutch Law.—The tenderness of English law towards infants is based on their presumed lack of discretion. Wisdom only arrives at twenty-one: till then they are not to be trusted to make contracts, and if they do, and do not afterwards like them, they may repudiate, however disingenuous or even fraudulent such repudiation may be. True,

there is a maxim known to our law—*Malitia supplet ætatem*—but this is reserved for cases of torts by infants. Roman-Dutch Law is not so sympathetic, as a recent Natal case shows (*Vogel & Co.* v. *Greentley*). There an infant represented himself to a firm as of age, and on the faith of such representation the firm gave him employment, the infant covenanting in the usual way not to engage in or be interested in any rival business during the continuance of the agreement. Then in contempt of good faith this unconscionable infant proceeded to do what he had expressly undertaken not to do—compete with his employers—and when sued he set up the plea of infancy. Could he do so? The Supreme Court was clear that by Roman-Dutch law, whatever might be the case in English law, he could not. He is estopped by his representation; otherwise, as the Court observed, the law would be giving scope to fraud of a very serious description. To be under disability is not to be *doli incapax*.

The Bar of Naples.—Signor Nunziante has published some figures as to the legal profession in Naples which ought to silence those who in other countries who complain of the excessive multiplication of lawyers. In that city are 1,298 advocates and 2,608 *avoués* and *procureurs*. Adding the judges and subordinate officials of all sorts, and clerks, there are altogether about 8,000 persons connected with law; which is a fair allowance for a town of 600,000 inhabitants. The probability is, says Signor Nunziante that owing to the rapidity with which the University turns out doctors of law, the number of advocates will soon be doubled. It is surprising to find that, in spite of the abundance of oratorical talents, they are admired as they nowhere else are. Crowds rush to hear a good speaker, and risk suffocation in order to listen to a "prince du parquet."

"Les plaidoyers durent parfois jusqu'à quatre ou cinq jours de suite. Les orateurs ont des élans admirables; ils parlent avec une fougue passionnée, ils troublent les juges et ils enlèvent l'acquittement de leur client aux jurés en les faisant pleurer. Souvent, à la péroraison d'un plaidoyer, l'auditoire la les frémissements d'une houle de mer, et il éclate enfin en bravos, malgré tes impuissants rappels à l'ordre du président et les glapissements des huissiers."

Ontario and Imperial Legislation.—"A new volume," writes Mr. James S. Henderson, "has been recently added to the Revised Statutes of Ontario to which special attention may be directed. By an Act of the old Parliament of Upper Canada it was provided that the law of England as it stood on October 15th, 1792, should prevail throughout Upper Canada in all matters relative to property and civil rights as well as in those relating to testimony and legal proof in the investigation of fact (see also Revised Statutes, vol. i. p. 1102). Till now, however, what Imperial Statutes were actually operative as to these matters within the Province of Ontario was always more or less doubtful, and it is to fill this gap in the legal literature of the Province that he present volume has been compiled. The work, which must have involved

the expenditure of much time and labour, has been carried out by Mr. George Smith Holmested, barrister-at-law and senior Registrar of the High Court of Justice for Ontario, under the supervision of a committee of judges. It contains the material sections of, or references to, a number of constitutional Statutes, certain others which are in force in the Province *ex proprio vigore*, and then the great body of old legislation of the English and British Parliaments which are of practical utility in Ontario has been carefully pieced together under appropriate headings. Besides being of great value to those most immediately concerned, the profession and people of Ontario, the work may well serve as a model for other Provinces to follow."

Bankers and Pass Books.—Sir John Paget, in the new edition of his work on Banking, discusses a point of much interest to bankers and business men—the nature of the pass book as between banker and customer. His view is that the pass book—when delivered by the banker with vouchers and returned unchallenged by the customer—ought to constitute a settled account, and he would have bankers co-operate to establish such a custom. But he is fain to admit that as the English authorities stand—*Vagliano* v. *Bank of England*, and *Chatterton* v. *Joint Stock Bank*—little reliance can be placed on the pass book as precluding a customer from disputing debts appearing therein or denying the genuineness of his signature to cheques cashed as his by the bank. Said Lord Esher in the latter case to counsel, "You are putting on the customer the burden of examining the pass book. What legal obligation is there on him to do so?" If this dictum is correct, it disposes at once of any implied consent on the customer's part arising from the relation of banker and customer to treat the pass book as a settled account. And there is good reason why a customer should object to its being so treated. Many, if not most, persons with banking accounts, when they ask for their pass books, do so merely to see—approximately—how they stand: not for the purpose of examining the account methodically with the vouchers, though at periodical intervals, if they are prudent people, they no doubt do so. To commit them, after such a hurried glance, to accept the pass book as a settled account would be putting the functions of a pass book too high. Much stricter views, however, on this subject prevail, as Sir John Paget shows, in the United States. The Supreme Court there have held that the sending of the pass book by the customer to be written up and returned with the vouchers is a demand to know what the bank claims to be the state of the customer's account, that the return of the book with the vouchers is the answer to that demand, and imports a request by the bank that the customer will in proper time examine the account so rendered and either sanction or repudiate the items. If the customer fails to do so, he may be estopped from questioning the conclusiveness of the account—all which is perfectly reasonable and more businesslike than our English methods, if once you postulate a mutual understanding and acceptance of the situation by banker and customer; but at present no such understanding exists in

England. Commercial law, however, grows, and if the co-operation of bankers can create a reasonable custom, the law will doubtless give it recognition.

Rifle Ranges and Crown Prerogative.—The Commonwealth of Australia magnanimously allows itself to be sued, and not long ago—under the Claims against the Colonial Government Act, 1875—we had the edifying spectacle of a prisoner bringing an action against the Government for an injury to his eye by an accident in prison. The latest example of a claim of this kind is *Evans* v. *Finn*, reported in the New South Wales Reports, 1904, at p. 297. It was an action by an owner and occupier of land for nuisance on the ground, in the words of the declaration—there is a good old-fashioned ring about them—that "the Commonwealth, its ministers, officers, agents, and servants, well knowing the premises, on divers days and times broke and entered the said land by wrongfully firing bullets from rifles over, across, or along the same in such manner as to continually imperil the lives and well-being of the plaintiff, his wife, children, and servants," etc., etc., a sort of nuisance—a dropping fire from bullets—extremely trying to sensitive nerves: nor, indeed, was the nuisance denied. The defence set up was, in a word, prerogative. It was the duty of the Crown to provide for the defence of the realm, and how could it do its duty efficiently without establishing rifle ranges, even if they involved some risk to the subject? It was plausible, but it failed to reckon with the constitutional principle that the Sovereign cannot invade the property of the subject, and the Supreme Court of New South Wales ruled that a rifle range which owes its existence to Crown prerogative stands in no better position than a rifle range belonging to a private individual. A statutory sanction is another matter. To such a shadow is the once flourishing doctrine of prerogative reduced!

Labour Treaties.—The Franco-Italian Labour Treaty of April 15th, 1904, is an innovation which may lead to important developments. It is probably the first Labour Treaty—a form of treaty which may be as common one day as are now Commercial Treaties. Twice before was an attempt made to carry such a measure; once in 1871, when Prince Bismarck and the Russian Government entered into negotiations, and again in 1900, when the French Minister of Commerce, M. Millerand, and the Belgian Government made a like attempt. Both attempts failed. Mainly intended to secure to the working classes of both countries the full benefit of their savings, the treaty of last April stipulates (Art. 1) that savings deposited in the post office savings bank of the one country may be transferred cost free at the request of the depositor to the savings bank of the other country. There are provisions for the transmission of sums by Italian workmen living in France to the Italian savings banks, and *vice versa*; and there is a stipulation that compensation for accidents in both countries will be given to workmen of both nationalities indifferently. Another valuable provision is one for the benefit of Italian children who are employed in large and increasing numbers in French manufactories. No one can

read the *Bulletin des Internationalen Arbeitsamt* without being convinced that a new chapter in the international relations of labour is opening.

Unanimity of Jurors.—The rule of English procedure which requires unanimity on the part of the jury as a condition of a verdict, even in civil cases, has not found favour in other countries. In the New World the rule has of late been much broken in upon. Professor Phillips, of the University of Colorado, gives a list of States in which verdicts need not be unanimous; usually a majority of three-fourths is required in civil cases. Some States have applied the same principles to criminal cases; others require a larger majority in such cases. In no fewer than sixteen States a jury may consist of fewer than twelve; some of them leaving the precise number very much to the parties. Thus, in the State of Washington, the minimum is not less than three by consent in civil cases. We note that several States have made provision that the trial is not to be interrupted by the illness or death of a juror. It will be interesting to see whether, as confidently predicted, there will be a great increase of convictions as the result of the relaxation of the rule as to unaminity. It is odd that one of the latest defences of the present system is to be found in *The Australian Law Review*, which states that the rule works wonderfully well in Australia.

Prison Education.—Perhaps no one living has had greater experience of prisoners, their ways, their weaknesses, and the germs of virtue in them than Mr. Z. R. Brockway, the well-known head of Elmira Prison. What he says in *The American Journal of Sociology* as to the moral education of criminals is at first sight very discouraging. His experience, however, is so great that his words must command attention. "Of the many thousands (of prisoners) carefully examined, none revealed a moral sense, in connection with the crime, either preceding, perpetrating, or in retrospection. . . . Of what is honourable and truly pleasant they have no idea, inasmuch as they never had a taste for it." Direct appeals to their better nature are of little use. "The persuasive power of public discourse and the prisoner's attitude of sincerity are ordinarily much over-estimated. After an exceptionally impressive sermon to prisoners, one of them said to me, 'I rather think *that* man may himself believe what he says.'" Mr. Brockway, however, admits that indirect appeals and attempts to interest them in matters new to them are generally successful.

"Native": Illegitimate Child of Native Woman by European.—The Supreme Court of Natal has recently had before it the question whether the illegitimate child of a native woman by an Englishman is a "native" within s. 5 of the Act 49 of 1898, and as such to be judged by a different law and before other tribunals than the ordinary citizen of the Colony. By the section in question, the term "native" is defined to "mean and include all members of the aboriginal races or tribes of South Africa south of the Equator," and a "native case" means a case in which both parties are natives. A year or two ago the Native High Court of the Colony held that a person born of the union of a European with a native woman is not —irrespective of

the legality of the union—a native. Admitting the general doctrine that an illegitimate child takes the status of his mother, the Court declined to interpret the doctrine as meaning that the illegitimate child was therefore to be regarded as of the same race as his mother; rather, if there was a doubt as to the child's legal status, he should have the benefit of it and the law be benevolently construed to raise and not to depress persons of mixed race. On this question of public policy, however, the Judges of the Supreme Court in *Govu* v. *Stuart* were at one with Burroughes J. in *Fauntleroy's* case, and preferred not to get astride a blind, restive horse not knowing where it might carry them. They saw no reason consequently for departing from the well-established rule of the civil law, *Ejus qui justum patrem non habet prima origo a matre.* In America it has been decided more than once that a person of half white and half Indian blood is not a white person.

England and the Defence of Poor Prisoners.—The Poor Prisoners' Defence Act, on which Mr. T. R. Bridgwater has published a useful little book, is a good illustration of the value of the comparative method in law. Here we have "fruits." Four years ago an article appeared in these pages by the author summarising the modes adopted in the different countries of Europe—France, Germany, Italy, Belgium, Denmark, Scotland—and in the United States for securing proper legal assistance for poor prisoners. In all, or nearly all, these countries, it appeared that the expenses of such assistance were paid by the State. The English Legislature has now accepted this principle, and Bentham's reproach has lost its sting—that while there is always somebody for the prosecution of delinquency in England, there is never anybody for the defence of innocence.

Branches of the Society.—The subjoined list shows the branches of the Society which have been formed. They extend, as will be seen, all over the Empire, and all of them are helping the Society either with contributions of money or by supplying it with Acts and Ordinances, Summaries and Notes of Legislation, and Reports of Decisions: most of them with both. This help is most welcome and valuable, and for it the editors, on behalf of the Executive Committee and the Society generally, tender to all the members of the branches their cordial thanks.

1. *Africa:*

Gold Coast Colony.
Lagos.
Sierra Leone.
South:—
  Cape Colony.
  Natal.
South:—
  Nigeria, Northern.
  Nigeria, Southern.
  Orange River Colony.
  Rhodesia.
Sudan.

2. *Australasia:*

Commonwealth of
Fiji.
New South Wales.
Tasmania.
Victoria.
Western Australia.

3. *Canada:*

Bermuda.	North-West Territories.
New Brunswick.	Nova Scotia.
Newfoundland.	

4. *Eastern Colonies:*

Ceylon.	Seychelles.
Hong-Kong.	Straits Settlements.
Mauritius.	

5. *Egypt.*

6. *India:*

Government of	Burma.
Bengal.	United Provinces.
Bombay.	

7. *Mediterranean Colonies:*

Cyprus.	Malta.
Gibraltar.	

8. *South Atlantic:*

Falkland Islands.

9. *West Indies:*

Bahamas.	Grenada.
Barbados.	Jamaica.
British Guiana.	St. Lucia.
British Honduras.	Trinidad.
Gambia.	

Printed by Hazell, Watson & Viney, Ld., London and Aylesbury.